TABLE OF CONTENTS

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1989-90

89-386 In re: James C. White, Jr., etc., and State Department of Revenue

v.

Reynolds Metals Company, et al.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Montgomery Circuit Court, CV-86-1093, CV-87-1837, CV-88-411, CV-88-424, CV-88-425, and CV-88-426-G)

ALMON, JUSTICE.

This Court issued a writ of certiorari in this case to address the questions raised by an advisory opinion request from the Governor. See *Opinion of the Justices No. 330*, [Ms. Dec. 5, 1989] ____ So. 2d ____ (Ala. 1989). At issue is the constitutionality of Alabama's franchise tax on corporations that are incorporated under the laws of other states, Ala. Code 1975, § 40-14-41 (foreign corporations). The challenge to § 40-14-41 concerns the relation of the tax imposed by that section to the franchise tax on corporations that are incorporated under the laws of this state, Ala. Code 1975, § 40-14-40 (domestic corporations). The two taxes are mandated by Ala. Const. 1901, Art. XII, §§ 229 and 232. The trial court held that § 40-14-41 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, pretermitting discussion of the plaintiffs' challenge under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3. The Court of Civil Appeals affirmed, *White* v. *Reynolds Metals Co.*, [Ms. Civ. 7246-X, Nov. 28, 1989] ____ So. 2d ____ (Ala. Civ. App. 1989).

On July 28, 1986, Reynolds Metals Company filed a petition for a writ of mandamus ordering the Commissioner of Revenue to set aside assessments of franchise taxes paid by Reynolds in

1982 and 1983 and to refund the taxes paid. Similar petitions, or appeals from denials of refunds, were filed by General Motors Acceptance Corporation ("GMAC"), GMAC Leasing Corporation, and General Motors Corporation ("GM"). Because all of the proceedings challenged assessments made pursuant to § 40-14-41 as violating the Equal Protection Clause and the Commerce Clause, the cases were consolidated. Amended pleadings were filed regarding subsequent tax years. The trial court entered a summary judgment for the plaintiffs.

Section 229 of the Constitution, as amended by Amendment 27, reads, in pertinent part:

> "The legislature *shall*, by general laws, provide for the payment to the state of Alabama of a franchise tax by corporations organized under the laws of this state which shall be in proportion to the amount of capital stock."

(Emphasis added.)

Section 232 of the Constitution, as amended by Amendment 473,[1] reads, in pertinent part:

> "No foreign corporation shall do business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association . . . . The legislature *shall*, by general law, provide for the payment to the state of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state."

(Emphasis added.)

Section 40-14-40 imposes on domestic corporations an annual franchise tax of $10 on each $1000 of capital stock, or a mini-

---

[1] The pertinent language of §§ 229 and 232 was not changed by the amendments to those sections; the language quoted is the same as originally adopted in 1901, except that Amend. 473 dropped the word "any" as a modifier of "business" where that word first appears in § 232.

mum of $50. Section 40-14-41(a) imposes on foreign corporations an annual franchise tax of $3 on each $1,000 of "the actual amount of its capital employed in this state," or a minimum of $25. Paragraph (b) of § 40-14-41 defines "capital," as we shall more fully discuss below; paragraph (c) provides that the actual amount of capital employed in this state "shall be determined in accordance with generally accepted accounting principles appropriate in the particular case"; and paragraph (d) sets forth exclusions and deductions.[2]

The circuit court and the Court of Civil Appeals viewed the Equal Protection Clause as requiring that the same franchise tax be imposed on both domestic and foreign corporations. However, § 40-14-40 imposes a tax that is "in proportion to the amount of capital stock" of a domestic corporation, that is, exactly as prescribed by § 229 of the Constitution; and, although § 40-14-41 provides in detail for the measurement of the "actual amount of capital employed" by a foreign corporation in this state, that section also sets forth a method of taxation that is designed to follow the mandate of the corresponding section of the constitution, § 232.

A franchise tax that apportioned a domestic corporation's capital stock according to how much it was employed in this state, or that used a different measure than "capital stock," would presumably not be "in proportion to the amount of capital stock" and thus would violate § 229. A franchise tax on the full amount of a foreign corporation's capital stock would clearly violate § 232. Thus, it appears that a tax calculated in the same manner for both domestic and foreign corporations would violate either § 229 or § 232 and that the legislature would be justified in enacting franchise taxes tailored to the terms of those sections.

---

[2] Section 40-14-41.1 imposes on "every corporation required by sections 40-14-40 and 40-14-41 to pay an annual franchise tax . . . an additional annual franchise tax of $.06 on each $1,000.00 of its capital stock *or* of the actual amount of its capital employed in this state." (Emphasis added.)

Therefore, a holding that the Equal Protection Clause or the Commerce Clause requires the same tax to be applied to both domestic and foreign corporations appears to require a holding that either § 229 or § 232 of our Constitution violates the United States Constitution. This we are loath to do. Although the Supremacy Clause, U.S. Const. Art. VI, cl. 2, binds "the judges in every state" to abide by the United States Constitution, "any thing in the Constitution or laws of any state to the contrary notwithstanding," we are also sworn to "support the Constitution of the United States, and the Constitution of the State of Alabama." Ala. Const. 1901, Art. XVI, § 279. It is therefore our duty to support both, if that be possible, before we conclude that the one violates the other.

History of the Franchise Taxes

To clarify the current relationship of the domestic and foreign corporation franchise taxes, we shall summarize their historical development.

After the adoption of the Constitution of 1901, the legislature adopted a franchise tax only on foreign corporations. Ala. Code 1907, §§ 2391-2400. This Court affirmed an assessment of taxes under that act, *Southern Ry.* v. *Greene*, 160 Ala. 396, 49 So. 404 (1909), but the Supreme Court of the United States reversed, 216 U.S. 400 (1910), holding that the tax violated the Equal Protection Clause.

The legislature responded by enacting a franchise tax on both domestic and foreign corporations, in the manner prescribed by the respective constitutional sections. Acts 1915, Act No. 464. In *Louisville & N. R.R.* v. *State*, 201 Ala. 317, 318, 78 So. 93, 94 (1918),[3] the Court held that the tax did not "operate as an arbitrary discrimination against foreign corporations." The statute levied a tax on every domestic corporation, with exceptions as provided in § 229, of 40 cents per $1,000 "of its paid-up capital stock" and a tax on foreign corporations,

[3] Appeal dismissed, 248 U.S. 533 (1918).

with exceptions as provided in § 232, of 40 cents per $1,000 "on the amount of capital actually employed in this state." The Court distinguished the tax from the one invalidated in *Southern Ry.* v. *Greene, supra*, and included the following discussion of the history of §§ 229 and 232:

> "The act, both as to foreign and domestic corporations, employs the exact language of the Constitution, and if we look to the journal and debates of the constitutional convention upon the adoption of sections 229 and 232, we think it is well demonstrated that the difference between the two was made for the sole purpose of avoiding a discrimination against foreign corporations. The committee on corporations reported to the convention section 229 as it now appears in our Constitution, and section 232, as reported, contained the words '*in proportion to the amount of its capital stock.*' An amendment was offered by Mr. Kyle, changing the words as italicized so as to read, '*shall be based on the actual amount of capital employed in this state.*' In support of this amendment Mr. Kyle, among other things, said:
>
> > "'for instance, take the Tennessee Coal & Iron Co. They have a capitalization of $30,000,000. They have large property in Tennessee as well as in Alabama. Therefore it should not be required of them, or any other corporation of like character, to pay its franchise tax upon property they own in other states. Take the Southern Iron & Foundry Company. They have a capitalization of $600,000 and own a small plant in this state. The main plant is in Tennessee. This amendment would reach all the capital they had in use in Alabama, but they would not have to pay upon the entire capital stock. The Western Union Telegraph Company, with $80,000,000 capital, would have to pay on the capital of $80,000,000 instead of what she has in this state. So this reaches the matter and makes it the property in possession of the state. The committee will accept that I hope.'
>
> "The section as amended was then adopted. Of course, this court is not bound by the debates of the constitutional convention, but they are often looked to, and the one in question is very persuasive that the framers of our organic law did not intend to discriminate against foreign corpora-

tions as to a franchise tax and adopted the foregoing amendment to section 232 for the sole purpose of avoiding a discrimination by fixing the basis for the franchise tax upon the amount of property actually employed in this state."

The constitutional convention, therefore, expressly amended the corporation committee's proposal that became § 232, so that a foreign corporation's franchise tax would be calculated according to the portion of its capital employed in this state, but it did not make such a change in the same committee's identically worded proposal for the tax on domestic corporations. The convention clearly envisioned that, absent the offered amendment, the proposed tax "in proportion to the amount of capital stock" would be calculated on the entire capitalization of the corporation. No such amendment was offered for the proposal that became § 229, so that section of the constitution directs the legislature to impose the tax on a domestic corporation's "capital stock" and does not provide for a reduction of a domestic corporation's franchise tax in proportion to its out-of-state capital.[4]

It can also be seen from the quoted portion of *Louisville & N. R.R.* that the Court considered the term "paid-up capital stock" to be synonymous to the term "capital stock." The Court later upheld franchise taxes imposed on a domestic corporation

---

[4] The United States Supreme Court upheld, against equal protection, commerce clause, and due process challenges, Alabama's nonapportioned tax on the capital stock of a domestic corporation doing a majority of its business in Tennessee and Mississippi. *Kansas City, Memphis, & Birmingham R.R.* v. *Stiles*, 242 U.S. 111 (1916). The Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on The Judiciary, House of Representatives, June 30, 1965, Vol. 3, Part IV, "Capital Stock Taxes," p. 909, concludes its discussion of the lack of a requirement of apportionment of states' taxes on domestic corporations by stating: "Today more than half of the capital stock tax States allow apportionment, but in seventeen of thirty-seven States domestic corporations must still pay tax measured by their entire capital." (Footnote omitted.)

"with a paid-up capital stock of $7,400,000," even though the corporation was in receivership. *State* v. *Bradley*, 207 Ala. 677, 678, 93 So. 595, 596 (1922).

> "The Constitution of 1901 (section 229, quoted ante) and the laws of Alabama impose 'franchise taxes' upon all existing domestic corporations, aside from exceptions of classes of which this corporation is not a member. Given the existence of a domestic corporation, the rate and tax period being prescribed by law as has been done, the only possible inquiry is the amount of the paid-up capital stock of the corporation. No assessment of the charge or imposition of this 'franchise tax' is required or even possible under the laws, organic and statutory, of this state. Assessment, for purpose of taxation—a quasi judicial act—was defined in *Perry County* v. *R. R. Co.*, 58 Ala. 552, as consisting of a listing and an appraisal of the value of the items of property listed. Neither of these acts is requisite to the imposition or exaction of a 'franchise tax' on domestic corporations; the laws of the state themselves effecting to impose the charge and exact its payment in expressly stipulated circumstances. The ascertainment, in a concrete case, of the monetary measure of the 'franchise tax' imposed and demandable, upon the basis of the domestic corporation's paid-up capital stock, is not a judicial, but a ministerial, act of the governmental authority charged with the duty of performing that service. *Grider* v. *Tally*, 77 Ala. 422, 424-426, 54 Am. Rep. 65.
>
> "A duty 'is ministerial when the law exacting its discharge prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act.' *Grider* v. *Tally*, *supra*.
>
> "In ascertaining the sum of the paid-up capital stock for the calculation of the amount of the 'franchise tax' demandable of a domestic corporation, no judicial discretion or judgment is left to the body charged with that duty."

Id., 207 Ala. at 679, 93 So. at 596.

Thus, in the course of discussing whether a corporation in receivership was subject to the franchise tax, the Court firmly

established the interpretation that the franchise tax would be measured by the corporation's paid-up capital stock, with no other factors taken into consideration. In 1920, the Attorney General issued an opinion stating that surplus capital was not to be included within the term "capital stock" as used in § 229. Atty. Gen.'s Biennial Report for 1919-20, p. 570. We do not see that that interpretation is necessarily a correct interpretation of § 229.

The Court in *Ellis* v. *W.A. Handley Mfg. Co.*, 214 Ala. 539, 540, 108 So. 343, 344 (1926), a case involving the foreign corporation franchise tax, noted:

> "We are, of course, aware of the fact that in some instances 'capital' and 'capital stock' are used interchangeably, but such cannot be the case here, as section 229 of the Constitution, in dealing with domestic corporations, expressly bases the franchise tax on the 'capital stock,' while section 232 bases the franchise tax on foreign corporations on the 'actual amount of capital employed in this state.'"

See, also, *State* v. *Guaranty Savings Building & Loan Ass'n*, 225 Ala. 481, 144 So. 104 (1932), holding a domestic building and loan association subject to a franchise tax on its paid-in (or paid-up—the two terms are synonymous) capital stock, and holding a statute declaring the contrary unconstitutional under § 229. That decision was overturned by Amendment 27, ratified in 1935, which exempted such institutions and retroactively ratified the statutes declaring such an exemption.

In 1982, the Court of Civil Appeals followed *State* v. *Bradley's* holding that a domestic corporation in receivership is subject to the franchise tax.[5] *State, Dep't of Revenue* v. *Forrester*, 419 So. 2d 231 (Ala. Civ. App. 1982). The Court also reiterated *Bradley's* statements that the tax on a domestic corporation is based on the amount of its capital stock, not on the value of its property:

---

[5] That principle from *Bradley* was enacted into the franchise tax article and is now found at § 40-14-56.

"The franchise tax on domestic corporations is based upon the amount of capital stock of the corporation and not upon the value of the corporate property. Article XII, § 229, Constitution of Alabama (1901); §§ 40-14-40 and -41.1, Code 1975. Alabama's franchise tax upon Alabama corporations 'is imposed upon corporate existence, not corporate activity or exerted corporate function.' *State* v. *Bradley*, 207 Ala. 677, 93 So. 595 (1922). In that case it was determined that the appointment of a receiver did not work a dissolution of the corporation and, although under receivership, the franchise tax was collectible."

Id., 419 So. 2d at 233.

Again in 1987, the Court of Civil Appeals cited the principle that § 229 allows imposition of a tax only on the amount of a domestic corporation's capital stock. The court held that "a *nonstock* member association" is not subject to the tax because it has no capital stock on which the tax can be imposed. *State* v. *Raymond M. Sims, D.M.D., P.A.*, 519 So. 2d 523, 523 (Ala. Civ. App. 1987) (emphasis in original), *writ quashed*, 519 So. 2d 524 (Ala. 1987).

Although these recent cases by the Court of Civil Appeals reaffirm the principle that a domestic corporation's franchise tax must be in proportion to the amount of its capital stock, they do not re-examine, in the light of the changed treatment of corporate stock, the old holdings that "capital stock" includes only paid-in capital stock. We see nothing in § 229 that necessarily limits the term "capital stock" to "paid-in capital stock." Although that interpretation may have been appropriate at one time, there is nothing in § 229 that prevents the legislature, should it so choose, from assigning to "capital stock" a meaning other than paid-in value.

There are many more cases applying the franchise tax on foreign corporations than there are applying the tax on domestic corporations, and they have concerned questions such as whether the property or business sought to be included in the tax base was in fact "capital employed" in this state by the foreign corporation, and, if so, how to measure its value and apportion it to the tax imposed in this state. See, e.g., *Ellis*,

supra; State v. *National Cash Credit Ass'n*, 224 Ala. 629, 141 So. 541 (1932); *State* v. *Anglo-Chilean Nitrate Sales Corp.*, 225 Ala. 141, 142 So. 87 (1932), *reversed*, 288 U.S. 218 (1933); *Investors' Syndicate* v. *State*, 277 Ala. 216, 149 So. 83 (1933); *State* v. *Southern Natural Gas Corp.*, 233 Ala. 81, 170 So. 178 (1936), *affirmed*, 301 U.S. 148 (1937); *State* v. *Pullman-Standard Car Mfg. Co.*, 235 Ala. 493, 179 So. 541 (1938); *Alabama Textile Products Corp.* v. *State*, 263 Ala. 533, 83 So. 2d 42 (1955).

At least partially in response to the holdings in some of the above cases, the legislature passed numerous amendments to the foreign corporation franchise tax, refining the definition of "capital employed" and providing certain exemptions. See, e.g., Acts 1935, No. 194; Acts 1955, Second Ex. Session, No. 74; Acts 1961, No. 912; Acts 1963, No. 255; Acts 1965, No. 764; Acts 1969, No. 1138; Acts 1971, First Ex. Session, No. 103; Acts 1971, No. 499; Acts 1973, Nos. 469 and 1173; Acts 1985, No. 85-412; Acts 1986, No. 86-214.

In contrast, the only amendments to the domestic franchise tax before 1983 simply raised the millage rate in conjunction with equal increases in the millage rate of the foreign corporation franchise tax. Acts 1935, No. 194; Acts 1955, Second Ex. Session, No. 74; Acts 1971, First Ex. Session, No. 103.

The legislature maintained the same rate on the two taxes until 1983, when it increased the rate for domestic corporations to \$10 per \$1000 of capital stock, or a minimum of \$50. Acts 1983, No. 83-745. On the motions for summary judgment, the parties submitted the depositions of James Sizemore, the Commissioner of the Department of Revenue, and Ernest Broadhead, the Chief of the Department's Division of Franchise tax. Broadhead explained the genesis of the increase in the domestic tax rate. He explained that in 1983, at the request of some legislators, he drafted a proposed amendment of the domestic franchise tax that would have imposed that tax in the same manner as the tax on foreign corporations. The draft included a bill that would have proposed an amendment to § 229. When it

became clear that those bills would not pass, Broadhead said, he hastily drafted a substitute bill, which became Act No. 83-745.

Long before these efforts to amend § 40-14-40, the legislature had passed a tax on the stock of domestic corporations that seems clearly to have been designed to offset the reduced base of the domestic franchise tax. Sections 40-14-40 and -41 trace back to the General Revenue Act of 1935, Act No. 194. In that same Act, the legislature imposed a tax on the stock of domestic corporations.[6] That stock tax is now codified at § 40-14-70 et seq. Its approach for valuing the stock is somewhat similar to the provisions in § 40-14-41 for valuing the capital employed in this state by a foreign corporation.

Although the domestic corporate stock tax is nominally imposed on the stockholders, not the corporation, § 40-14-73 allows a corporation to avoid filing a list of its shareholders by agreeing to pay the tax itself. Commissioner Sizemore stated in his deposition that all domestic corporations pay the tax, and Broadhead stated the same thing in an affidavit. There was evidence presented on the summary judgment motions showing the relationships among the foreign corporation franchise tax, the domestic corporation franchise tax, and the domestic corporation stock tax, as we shall show below.

The following overview of corporate franchise/capital stock taxes was published in 1965 as Chapter 29 of the Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on The Judiciary, House of Representatives, June 30, 1965, Vol. 3, Part IV. It provides an informative background to the detailed history of such taxes in Alabama. The excerpts here are from pp. 903-911:

---

[6] Previous versions of the franchise taxes and the corporate stock tax had also been enacted in General Revenue Acts that were, according to the practice of the time, not codified. In their present codification, they trace to the Act of 1935.

"At the present time thirty-six States [fn.1] and the District of Columbia [fn.2] raise revenue from businesses in corporate form through taxes measured in one way or another by the amount of the corporation's capital. Thus, in terms of the number of States employing it, the capital stock tax is comparable to the corporate net income tax and the sales tax.

". . . .

"At the outset, it should be noted that taxes on or measured by corporate capital are levied under various names, such as 'Corporation Franchise Tax,' 'Corporation License Tax,' or 'Corporation Business Tax.' Although they employ a wide range of techniques for valuing the tax base, all are annually recurring levies measured by the value of a corporation's capital, as distinct from its property. These taxes will be treated together in this report under the term 'capital stock taxes.' They have been selected for study as a group because they raise a common problem for multistate business. Since the tax is computed by reference to the entire value of the corporation's capital, it becomes necessary to determine what proportion of that value is taxable in each State. It is this common problem of division of the base which more than any other makes these taxes suitable for study as a group.

"Despite the wide variety among capital stock taxes in techniques for valuing the tax base, the bases employed fall readily into two general categories. In one category are narrow bases taken from the corporation's statement of capital, either authorized shares or outstanding (or issued) shares, generally valued at par in the case of par-value shares and at various arbitrary amounts, such as $100 a share, in the case of no-par shares. Tax bases of this type will be classified under the term 'capital-account' bases. In the other category are broader bases reflecting in a variety of ways historical earning capacity or value as a continuing business enterprise. These bases are generally defined in terms of balance sheet items with some adjustments for more realistic valuation. They may be measured by corporate net worth (*i.e.*, the excess of assets over liabilities); or by the market value of the corporation's shares. All of these bases will be classified under the term 'capital-value' bases. Also included with the capital-value

bases are the so-called 'corporate excess' taxes, although their closer relation to property taxes requires separate historical treatment in this chapter.

". . . .

"Beginning about the turn of the century, the number of capital stock tax States grew rapidly. In 1902, there were thirteen such States. By 1912, the number had reached twenty-five, and by 1929 it was thirty-three. The surge of capital stock taxes appears to have crested by 1929; since then the total has increased by only four.

". . . .

"This brief history demonstrates how the capital stock tax grew out of two very distinct forms of tax, each of which has left traces that are important in any appraisal of the present system. On the one hand, there were the one-time incorporation and entrance fees exacted for the privilege of existence or operation as a corporation. These fees, even if not flat amounts, are measured with reference only to the technical corporate structure. The capital account taxes today appear to be such fees made annually recurring. This form of tax base is readily ascertainable, but takes no account of the going-concern value of the corporation.

"On the other hand, there were the ad valorem property taxes. Today's capital value taxes appear to have evolved from these property taxes, and are measured by a base which is essentially the entire corporation valued as an entity. Tax bases of this kind are not calculable according to precise statutory rules, but instead their definition consists of no more than a generalized standard for valuation. Indeed, in many States the tax authorities have power to consider any facts found relevant in reaching a correct valuation and to revise the taxpayer's valuation and make an additional assessment.

". . . .

"The capital stock tax has retained features which inhibit its revenue-producing potential. The most important of these is the continued use by half of the States of capital-account bases, which fail to reflect any element of going-concern value.

"1 Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and West Virginia.

"2 As in other parts of this report, the District of Columbia is treated hereafter as a State."

In the terms of that report, one could say that § 40-14-40 imposes on domestic corporations a capital-account tax, and that §§ 40-14-41 and -70 impose capital-value taxes.

Given these facts, we now turn to a discussion of the standards that have been developed by the United States Supreme Court for applying the Equal Protection and Commerce Clauses to questions similar to the ones presented here.

Equal Protection of the Laws

The Equal Protection Clause provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. 14. The term "person" was long ago held to apply to corporations. *Santa Clara County* v. *Southern Pac. R.R.*, 118 U.S. 394 (1886); and see *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985).

State tax legislation is given great deference before it will be found to be in violation of the Equal Protection Clause.

> "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interest. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the

Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value . . . . 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.'"

Allied Stores of Ohio, Inc. v. *Bowers*, 358 U.S. 522, 526-27 (1959), quoting *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 159 (1930).

"The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 666, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."

Lehnhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) (footnote omitted).

"In *Madden* v. *Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590, a State laid an ad valorem tax of 50¢ per $100 on deposits in banks outside the State and only 10¢ per $1,000 on deposits within the State. The classification was sustained against the charge of invidious discrimination, the Court noting that 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' *Id.*, at 88, 60 S.Ct., at 408. There is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' *Ibid.* And the Court added, 'The burden is on the one attacking the legislative arrangement

to negative every conceivable basis which might support it.' *Ibid.* That idea has been elaborated. Thus, in *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, the Court, in sustaining an unemployment tax on employers, said:

> "'A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.' *Id.*, at 510, 57 S.Ct., at 872."

Id., at 364-365 (footnote omitted). See, also, *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976).

The above-quoted standards of review were also applied in *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 195-96 (1983).

In equal protection analysis of challenges to tax statutes, the basic test is that a classification for taxing purposes will be upheld if it is rationally related to a legitimate state purpose, "a relationship that is not difficult to establish." *Metropolitan Life Ins. Co., supra*, 470 U.S. at 881; *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981); *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371 (1978); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

> "In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?

Western & Southern Life Ins. Co. v. *State Bd. of Equalization*, 451 U.S. 648, 668 (1981).

This case is unlike *Metropolitan Life Ins. Co.* v. *Ward*, *supra*, because that case involved premium taxes that were facially discriminatory against foreign insurance companies: a three or four percent rate was imposed on premiums collected by foreign companies, but only a one percent rate was imposed on domestic companies. Here, a finding of discriminatory treatment cannot be made from the face of the statutes themselves, but only by consideration of the *effect* of the taxes.

Commerce Clause

The Commerce Clause provides: "The congress shall have power to . . . regulate commerce . . . among the several states." U.S. Const. Art. I, § 8, cl. 3. The prohibitions of the Commerce Clause apply even in the absence of action by Congress on the principle that the clause itself prohibits an undue burden on interstate commerce by the states. *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977); *Freeman* v. *Hewit*, 329 U.S. 249 (1946).

"No state, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange*, 429 U.S. at 328, quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 403 (1984).

The Court has recently changed its analysis of the application of this clause to tax statutes. The current test is that a tax must (1) have a sufficient nexus to the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be reasonably related to the services provided by the taxing state. As part of the apportionment test, the Court has held that a tax must be internally consistent, that is, that it must be susceptible of application by all of the states without burdening interstate commerce. *Amerada Hess Corp.* v. *Director, Div. of Taxation, New Jersey Dept. of the Treasury*, ___ U.S. ___, 109 S. Ct. 1617 (1989); *Goldberg* v. *Sweet*, ___

U.S. ____, 109 S. Ct. 582 (1989); *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

Applications Of The Standards To This Case

We note here that the ultimate question in applying either equal protection or commerce clause analysis to these facts is virtually the same. The foreign corporation franchise tax has a nexus to this state and is apportioned fairly, because only such portion of the corporation's capital as is employed in this state forms the base for the franchise tax. It is reasonably related to services provided by this state, because the corporate function depends upon the provision of services such as roads, police and fire protection, etc. Therefore, the only element of the commerce clause test that is at issue here is the discrimination against interstate commerce test. While there are certain differences between this test and the test for application of the Equal Protection Clause, they are sufficiently similar that the bulk of our analysis will not treat them separately.

The question, as we see it, is whether the franchise tax on foreign corporations *invidiously* discriminates against them by imposing a grossly disproportionate tax on them for no other reason than to provide a competitive advantage to domestic corporations. We emphasize the term "invidiously" because the tax will be sustained if its classifications are rationally related to a legitimate state purpose and because, in enacting taxing statutes, legislatures are not required to reach equality with mathematical precision.

> "[A] statutory classification impinging upon no fundamental interest, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it. *Williams* v. *Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 925 (1955). That [a state] might have furthered its underlying purpose more artfully, more directly, or more completely

> does not warrant a conclusion that the method it chose is unconstitutional. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed. 2d 828 (1966)."

Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976); *Lehnhausen* v. *Lake Shore Auto Parts, supra; Allied Stores of Ohio, Inc.* v. *Bowers, supra.*

The guiding principles for courts to apply when legislative acts are challenged as unconstitutional were ably expressed in *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944):[7]

> "Uniformly, the courts recognize that this power is a delicate one, and to be used with great caution. It should be borne in mind, also, that legislative power is not derived either from the state or federal constitutions. These instruments are only limitations upon the power. Apart from limitations imposed by these fundamental charters of government, the power of the legislature has no bounds and is as plenary as that of the British Parliament. It follows that, in passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government. All these principles are embraced in the simple statement that it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law. State ex rel. Wilkinson v. Murphy, 237 Ala. 332, 186 So. 487."

See, also, *Home Indemnity Co.* v. *Anders*, 459 So. 2d 836 (Ala. 1984); *Crosslin* v. *City of Muscle Shoals*, 436 So. 2d 862 (Ala. 1983); *Thorn* v. *Jefferson County*, 375 So. 2d 780 (Ala. 1979); *Mobile Housing Bd.* v. *Cross*, 285 Ala. 94, 229 So. 2d 485 (1969).

Thus, when testing the constitutionality of a statute, the only question for the Court to decide, under the constitutional separation of powers, is one of legislative power, not of legis-

---

[7] Appeal dismissed, 325 U.S. 450 (1945).

lative expediency or legislative wisdom. All questions of propriety, wisdom, necessity, utility, and expediency are exclusively for the legislature to determine and are matters with which the courts have no concern. *Alabama State Federation of Labor* v. *McAdory, supra; Fireman's Fund American Ins. Co.* v. *Coleman*, 394 So. 2d 334, 352-53 (Ala. 1980) (Shores, J., concurring in the result); *Reed* v. *Brunson*, 527 So. 2d 102, 116 (Ala. 1988); *Friday* v. *Ethanol Corp.*, 539 So. 2d 208, 211 (Ala. 1988).

Our legislature is faced with a difficult problem of imposing a franchise tax, because §§ 229 and 232 prescribe different methods of imposing the tax. Section 229 makes no allowance for apportionment of the domestic corporation franchise tax according to the amount of a corporation's capital stock that is attributable to activities within the state, while § 232 requires such an apportionment for foreign corporations, as it must under the Commerce Clause. The problem is compounded by historical developments that "capital stock" in § 229 was held to mean only paid-in capital stock and that that measure of capital stock is no longer as appropriate a measure of the actual capitalization of a corporation as it was when the first franchise tax statutes were enacted pursuant to §§ 229 and 232.

Thus, we find that the plaintiffs' claims of unequal treatment and discrimination against them are answered by two factors in the record that are not taken into account in the opinion of the trial court or that of the Court of Civil Appeals, and which presumably have been taken into account by the legislature in its efforts to enact nondiscriminatory taxes. The first is that, while it is true that there are more domestic corporations doing business in this State than there are foreign corporations doing business in this State and that, as is shown in the opinions below, those domestic corporations paid less tax, it is also true that the foreign corporations, although smaller in number, actually employ more capital in this state than domestic corporations do. The second is that the discrepancy in the franchise tax diminishes substantially when the tax on the stock of domestic corporations is taken into account.

Both of these points are illustrated by the affidavit of Ernest Broadhead:

"My name is Ernest J. Broadhead. I am presently the Chief of the Franchise Tax Division of the Alabama State Revenue Department, which office I have held since July, 1983. In this position, I have become acquainted with the taxation of foreign and domestic corporations for franchise tax purposes in Alabama. Foreign corporations pay franchise tax based on their capital employed in the State of Alabama and pay no tax on their corporate shares of stock, whereas domestic corporations pay both a franchise tax based on the amount of their capital stock and a share stock tax which is an ad valorem tax on the corporate shares of stock. While the legal incidence of the share tax is on the stockholder, in practice the share tax is always paid by the corporation. I know of no incidence in which the share stock tax has been paid by the shareholder as opposed to the corporation. The following table shows the impact of the share tax in Alabama:

"1. Number of domestic share tax assessments by year

"2. Estimated total tax using average state millage rate (0.38)

"3. Estimated average per corporation.

	"1987	1986	1985	1984
"1.	45,048	42,902	41,348	39,501
"2.	$13,563,668	$11,470,954	$11,197,983	$11,517,468
"3.	301.09	267.37	270.82	291.57

"The above figures are conservative because they are based on the statewide tax rate of 38 mills. Proportionally more corporations are located in larger metropolitan areas which usually have higher millage rates. For instance, the millage rate as of October 1, 1986, in Huntsville was 68.5; in Birmingham was 70.6; in Mobile was 51.5; and in Montgomery was 34.5

"The study conducted by the Department of Revenue, which is a part of the record in this case, shows that for the

tax year 1983, 38,772 domestic corporations and 11,234 foreign corporations paid franchise taxes. Had both the foreign and domestic corporations paid franchise taxes based on the capital employed in this state at the rate of $3.00 per $1,000.00 capital employed, an average domestic corporation would have paid $991.70, while an average foreign corporation would have paid $4,148.79. This shows that foreign corporations on average employ in excess of four times the amount of capital in this state as domestic corporations. It further shows that all the capital employed by all the domestic corporations in this state is only 45% of the amount employed by all foreign corporations. It can be seen from this that one of the reasons that the average tax for foreign corporations exceeds that of domestic corporations is that the foreign corporations are bigger and employ more capital and that many of the domestic corporations are small by comparison to the foreign corporations.

"It has been my experience that foreign corporations can manipulate the amount of franchise taxes they pay in Alabama merely by forming domestic corporate subsidiaries to do business in this state or by becoming Alabama corporations themselves."

The State filed a brief in support of *its* motion for summary judgment that included the following argument based on Broadhead's affidavit:

"Before a tax is subject to the rational basis test, the Taxpayer must initially show that discrimination exists. The Taxpayers have attempted to do this through the use of statistics showing that Alabama receives more franchise taxes on average from foreign corporations than it does from domestic corporations. While this may be true, it is also true that a particular corporation's franchise tax liability is determined by its capital structure and corporate make-up, and it also depends to a large extent on the size of the corporation. The Affidavit of Ernest J. Broadhead, Chief of the Franchise Tax Division, Department of Revenue, shows that for the tax year 1983, 38,772 domestic corporations and 11,234 foreign corporations paid franchise taxes. Had both the foreign and domestic corporations paid franchise taxes based on the capital employed in this state at the rate of $3.00 per $1,000 of capital

employed, an average domestic corporation would have paid $991.70, while an average foreign corporation would have paid $4,148.79. What these figures mean is that foreign corporations on average employed in excess of four times the amount of capital in this state as domestic corporations. This accounts for some of the discrepancy between what an average foreign corporation pays in franchise taxes and what an average domestic corporation pays in franchise taxes. The Affidavit also shows that all the capital employed by all the domestic corporations in this state constitutes only 45% of the amount employed by all foreign corporations. It can readily be seen from this that one of the reasons that the average tax for foreign corporations exceeds that of domestic corporations is that the foreign corporations are bigger and employ more capital and that many of the domestic corporations are small by comparison to the foreign corporations doing business within the State of Alabama.

"This fact can be illustrated using the statistics in the record in this case. Assume that the capital employed by a corporation in Alabama is indicative of its size and that therefore foreign corporations are on average approximately 4.5 times as large as domestic corporations ($4,148.00 versus $991.00). Exhibit B to the Rawls Brief shows that for the year 1985, an average domestic corporation paid $303.28 in franchise taxes while an average foreign corporation paid $3,685.40 in franchise taxes. Assume, however, that the domestic corporation also paid $270.82 in share taxes, as shown by the Affidavit of Broad head attached to the State's Motion for Summary Judgment. Adding the $303.28 to the $270.82 gives a sum of $574.10 in total taxes paid by the domestic corporation. If you multiply the $574.10 paid by domestic corporations times a factor of 4.5 to take into account the discrepancy between the relative sizes of domestic versus foreign corporations, the domestic corporation, would have paid $2,583.45 in taxes, as opposed to the $3,685.40 paid by the foreign corporation. While these two amounts are not equal, the discrepancy between the two in no way approaches the discrimination which the Plaintiffs would have this Court believe exists.

"The figures for the 1984 tax year are even more compelling. In that year domestic corporations paid a total of

$325.29 in franchise taxes and $291.57 in corporate share taxes, for a total of $616.86. If one multiplies this figure times the factor of 4.5 one may see that a domestic corporation of a size comparable to an average foreign corporation would pay a total of $2,815.87 in taxes. A foreign corporation in that same year paid on average $3,323.08 in franchise taxes. The domestic share tax figures are estimates based on the average statewide tax rate of 38 mills. It stands to reason that proportionally more corporations are located in the large metropolitan areas, which have a higher millage rate. For instance, as of October, 1986 Huntsville had a millage rate of 68.5; Birmingham had a rate of 70.6; Mobile had a rate of 51.5 and Montgomery had a rate of 34.5. Had the estimates been weighted toward the higher millage rates which exist in the larger cities, the figures might well show that the total tax paid by domestic corporations equals that of foreign corporations. In short, the apparent discrimination argued by the Plaintiffs does not in reality exist.

"The Taxpayers make much of the fact that domestic corporations can manipulate the amount of franchise tax they must pay by reducing the amount of their capital stock. However, foreign corporations can likewise manipulate the amount of franchise taxes they must pay merely by forming domestic corporate subsidiaries or by becoming domestic corporations themselves. According to Broadhead, this has in fact been done."

We note that Broadhead inadvertently stated that his figures showed that domestic corporations employed only 45% of the capital employed by foreign corporations. What his figures in fact show is that domestic corporations employ 45% of the entire capital employed in the state by corporations while foreign corporations employ 55%.[8]

---

[8] As follows: 38, 772 domestic corporations x $991.70 average tax on a capital-employed base at a 3-mill rate = $38,450,192.40 total domestic franchise tax; 11,234 foreign corporations x $4,148.79 average tax on the same base and rate = $46,607,506.86 total foreign franchise tax. $38,450,192.40 is 45.2% of the $85,057,699.26 total franchise tax. Because the tax in these calculations varies only with capital employed, the proportionate shares of capital employed would be the same as the proportionate shares of tax.

Broadhead's affidavit shows that his estimates of the stock tax are almost certainly low, because Birmingham, Huntsville, and Mobile have tax rates[9] that are substantially higher than the average figure used in Broadhead's calculations, and those three cities would certainly have the greatest concentration in the state of domestic corporations with high values of corporate stock. This means both that the figures in Broadhead's affidavit for tax paid by domestic corporations are low and that the calculation of the exact amounts would be so difficult that deference to the legislative judgment on the method for equalizing the relative burdens on domestic and foreign corporations is in order.

Perhaps the most significant fact about these calculations is that they are based on figures that Broadhead derived by examining domestic corporations' stock tax returns. This illustrates the point that the legislature has instituted the domestic stock tax to overcome the perceived restrictions imposed by § 229 (the absence of an apportionment provision and the "paid-in capital" interpretation) and to reach a tax base that is more nearly equivalent to that of foreign corporations. Also of great significance is the fact that, in deriving a hypothetical "capital employed" franchise tax for domestic corporations, Broadhead was not able to apply an allocation factor:

> "The one factor . . . that we were not able to include that would normally be a part of this is the allocation. So an assumption was made that all of the tax was—on these generally smaller domestic corporations were Alabama firms or had a one hundred percent capital employment factor in Alabama."

Thus, his figure of $991 as a "capital-employed" tax on domestic corporations is obviously high, and the discrepancy between the capital employed by domestic and foreign corporations is larger than his calculations show it to be and, correspondingly, the discrepancy in allocation of the tax burden is smaller than his calculations show it to be.

---

[9] The state and county millage rates are constant, so only the municipal rates vary.

The point that the legislature has designed the domestic stock tax to complement the foreign franchise tax is made also by a comparison of § 40-14-41 with § 40-14-70. Although the definition of capital in § 40-14-41(b) is somewhat different from the factors set out in § 40-14-70(a) and (c) to be used in valuing a domestic corporation's stock, those methods of valuation reach largely the same elements of corporate worth. The investments of domestic corporations in other states are deducted from the value of the corporate stock before the tax is calculated, § 40-14-70(d)(1), so the domestic stock tax is apportioned to some degree as the foreign corporation franchise tax is apportioned. Another fact that shows that the legislature has treated the stock tax on domestic corporations as corresponding to the franchise tax on foreign corporations is that recent amendments have added the same deductions to both taxes. Sections 40-14-41(d)(2)c and 40-14-70(d)(1) allow deductions for investments in air and water pollution control devices. Sections -41(d)(2)d and -70(d)(3) allow deductions for investments in "qualifying counties," that is, counties with high unemployment rates. Furthermore, the Department of Revenue administers the corporate stock tax through a Shares Tax Section within the Franchise Tax Division.

The United States Supreme Court has upheld taxing statutes that appeared to discriminate against interstate commerce by holding that the state's tax scheme compensated for the tax by a substantially equivalent tax intrastate commerce. *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472 (1932) (use tax on out-of-state purchases brought into state compensated for by sales tax on in-state purchases); *Alaska* v. *Arctic Maid*, 366 U.S. 199 (1961) (exemption from tax on Alaska fish catches for fish to be canned in Alaska justified because of tax on Alaska fish canners); *Public Util. Dist.* v. *Washington*, 82 Wash. 2d 232, 510 P. 2d 206, appeal dismissed for want of a substantial Federal question, 414 U.S. 1106 (1973) (deduction, from tax on sale of electric power, for sales for resale within state not discriminatory because resales within state would be subject to the same tax).

The above-cited cases are analyzed at J. Hellerstein, *State Taxation*, vol. 1, "Corporate Income and Franchise Taxes," paragraph 4.12[5], pp. 147-48 (1983). Hellerstein questions the rationales of such cases at pages 149-51 and, in the 1988 cumulative supplement, notes that more recent United States Supreme Court cases have not allowed the comparison of complementary taxes to validate taxes that, by themselves, impose an undue burden on interstate commerce. *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987); *Tyler Pipe Industries, Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232 (1987); *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981).

Hellerstein elsewhere says, however, that a capital stock tax *is* a corporate franchise tax:

> "The capital stock tax, which has had a long history in State taxation, has its roots in the property tax. The earliest form of general corporation tax in this country, the corporate excess tax, was not a special tax but a modification of the general property tax. It was a levy on the value of a corporate business in excess of the value of its assets. The excess included goodwill, doing business value, and other factors that are reflected in the market value of the corporation's stock. At first, this intangible 'corporate excess' value was assessed and taxed to the shareholders. Subsequently, it was levied on the corporations themselves. This form of corporate taxation has largely given way to the capital stock tax.
>
> "The capital stock tax is typically an annual franchise tax, imposed on domestic corporations for the privilege of existing as a corporation, and on foreign corporations for the privilege of doing business, or the actual conduct of business, within the taxing State. It is usually measured by the value of the business as a going enterprise, determined on a book value basis, although in some States an attempt is made to utilize the market value."

Hellerstein, *op. cit.*, paragraph 11.1, pp. 691-92 (footnotes omitted).

Because of the perceived restrictions in our Constitution, the legislature has divided the franchise tax on domestic corpora-

tions into the "franchise tax" as such and the corporate stock tax. No such restrictions exist with respect to foreign corporations, so the franchise tax on those corporations has not been so divided. There is no stock tax on foreign corporations in Alabama.

When the franchise tax on foreign corporations is compared to the aggregate of the franchise tax and the corporate stock tax on domestic corporations, taking into account the large amount of capital employed in this state by foreign corporations and the relatively smaller amount employed by domestic corporations, the alleged unequal treatment of and discrimination against foreign corporations diminishes to a point that no discrimination of constitutional significance exists. The legislature is not required to reach equality with mathematical exactness, and legislation will be presumed constitutional unless shown otherwise by clear and convincing proof.

Even assuming that the lack of uniformity in the taxes on domestic and foreign corporations rose to a level of discrimination that would invoke equal protection or commerce clause analysis, we would hold that § 40-14-41 does not violate those provisions, for the following reasons.

The Court held in *Louisville & N. R.R.* v. *State, supra*, that the purpose behind §§ 229 and 232 and the taxes enacted pursuant thereto was to collect franchise taxes that did not discriminate against foreign corporations. That is concededly a legitimate state purpose. We find that the purpose behind the historical amendments to the foreign corporation franchise tax, the domestic corporation franchise tax, and the domestic corporation stock tax has been to maintain that lack of discrimination as nearly as was feasible within the framework imposed on the legislature by §§ 229 and 232 and the cases interpreting them. In determining whether "it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose," *Western & Southern Life, supra*, we need only inquire whether the legislature engaged in "invidious" or "hostile and oppressive discrimination," *Lehnhausen, supra*.

There is no showing of invidious discrimination or hostile purpose. Rather, a tax that was originally imposed under an express state constitutional mandate not to discriminate against foreign corporations, and that originally did not so discriminate, developed, in its application and over time, to be somewhat more discriminatory. This came about, not through an increase of the tax on foreign corporations, but by a decrease of taxes paid under the franchise tax by domestic corporations. The decrease of the domestic franchise tax came about, not through legislative action, but through actions taken by domestic corporations to pay less money in franchise taxes.

It can be seen that the legislature, rather than invidiously fostering any such discrimination, took steps within the perceived restrictions of the Alabama Constitution to offset any unequal treatment, primarily by the use of the corporate stock tax. In the ongoing efforts to maintain the constitutionally required level of equal treatment, certain legislators introduced bills in the 1983 session that would have proposed an amendment to § 229 of the Constitution and thereby imposed a capital-employed franchise tax on domestic corporations. When it became clear that those bills were not likely to pass, the legislature substituted a bill that raised the rate and the minimum for the franchise tax on domestic corporations.

Other than the bare fact of that legislative activity in 1983, there is no evidence that, prior to the institution of this lawsuit, the legislature had any indication that its chosen means of implementing the corporate franchise taxes was not reasonably related to the purpose of imposing a non-discriminatory tax system. Indeed, the evidence that was developed in this case shows that consideration of the relative amounts of capital employed (even under Broadhead's unapportioned analysis of a capital-employed tax on domestic corporations), together with the domestic stock tax, brings the relative tax burdens much closer than they would appear to be under the isolated facts cited in the opinion of the Court of Civil Appeals.

The Court of Civil Appeals quoted the trial court's statement that, aggregating the taxes paid and the returns filed in 1982

and 1983, 29,000 foreign corporations paid $94,000,000 in franchise taxes while 82,000 domestic corporations paid less than $10,000,000. Using these figures alone, one would conclude that the average foreign corporation paid 26.6 times more tax than the average domestic corporation. However, once Broadhead's calculations of the relative amounts of capital employed by domestic and foreign corporations (45% by the 38,772 domestics and 55% by the 11,234 foreigns filing returns in 1983) and the domestic stock tax are factored in, the relative burdens are not so disproportionate that we can say that the legislative taxing method is not rationally related to the purpose of enacting a non-discriminatory tax.

Furthermore, the plaintiffs in this case have not presented sufficient evidence under *Lehnhausen*, *supra*, to negate a number of legitimate purposes of the present legislation that are apparent to this Court and that are reasonably likely to be promoted by the statutory distinction. Legitimate purposes for the statutory distinction between foreign and domestic corporations could certainly include, in addition to the mandate of the Alabama Constitution, ease of regulation and enforcement, differences in the utilization of state natural resources between foreign and domestic corporations, and differences in the employment of state residents and utilization of state services between foreign and domestic corporations.

With respect to the purpose of ease of regulation and supervision, we are aware that the legislature has enacted various provisions for the dissolution of domestic corporations or for proceeding against individual shareholders for collection of taxes that cannot apply to foreign corporations. The United States Supreme Court has held that ease of regulation can serve as a rational basis for a distinction between "persons" under equal protection analysis. See *G. D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982) (difficulty of obtaining jurisdiction over nonresident corporation justified distinction in statute of limitations); *Madden* v. *Kentucky*, 309 U.S. 83 (1940) (differences in ability to enforce state remedies justifies different treatment of foreign organizations); *Metropolitan Casualty*

Ins. Co. v. *Brownell*, 294 U.S. 580 (1935) (domicile of insurer relevant to limitations statutes because such insurers' offices were generally located outside of the state); *Board of Education* v. *Illinois*, 203 U.S. 553 (1906) (state's greater control over domestic corporations justified a discriminatory inheritance tax as to foreign corporations).

Thus, we hold that § 40-14-41 does not violate the Equal Protection Clause.

Turning to the Commerce Clause, we must inquire whether the taxes in question impose an undue burden on interstate commerce. The weighing of factors pertinent to the franchise taxes and the corporate stock tax leads to case-by-case differences as to whether Alabama citizens wishing to incorporate a business would find it advantageous to form an Alabama corporation or to incorporate in another state. At oral argument, the amicus curiae indicated that, for example, if a business has large intangible assets, the domestic stock tax would be so burdensome that the incorporators would inevitably choose to incorporate in another state, such as Delaware.

These considerations are affected by the kind of business the corporation would be doing in this state and by the nature of its assets, not by the distinction between intrastate business and interstate business. The same considerations would apply to the decision of a foreign corporation in deciding whether to form a subsidiary Alabama corporation to conduct its business here or to conduct its business through a division of the existing corporation.[10]

In the United States, which has 50 sovereigns that tax corporations, there will inevitably be incentives for incorporating in one state for certain types of business and in other states for

---

[10] The fact that, when circumstances make it to their advantage to do so, foreign corporations can and do use subsidiaries to minimize payment of franchise taxes is recognized and allowed in *Consolidated Coal Co.* v. *State*, 236 Ala. 489, 183 So. 650 (1938); and *State* v. *Pullman-Standard Car Mfg. Co.*, 235 Ala. 493, 179 So. 541 (1938).

other types of business, regardless of the actual place of doing business or the interstate or intrastate nature of that business. Are the Delaware tax laws that provide incentives for many businesses to incorporate there necessarily unconstitutional? We think not. Similarly, the Alabama tax laws that in some cases favor domestic incorporation and in others favor doing business here as a foreign corporation cannot be said to violate the Commerce Clause. We note that Broadhead, in response to GMAC's requests for admissions, said that if GMAC had been taxed in 1986 as a domestic corporation instead of as a foreign one, it would have paid $21,650,000 under § 40-14-40 instead of the $1,370,427 it paid under § 40-14-41.

Thus, Alabama's taxation of domestic and foreign corporations does not violate the Commerce Clause.

For the foregoing reasons, we hold that there is no unconstitutional unequal treatment of foreign corporations and no unconstitutional discrimination against them. Therefore, § 40-14-41 does not offend either the Equal Protection Clause or the Commerce Clause. The judgment of the Court of Civil Appeals is therefore reversed, and a judgment is hereby rendered for the State on its motion for summary judgment.

REVERSED AND JUDGMENT RENDERED.

Hornsby, C. J., and Maddox, Jones, Shores, Adams, Houston, Steagall, and Kennedy, JJ., concur.

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

December 5, 1989

In re: James C. White, Jr., etc., and
State Department of Revenue

v.

Reynolds Metals Company, et al. (Civ. 7246-X)

WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

ORDER

The Court having this day issued a writ of certiorari to the Court of Civil Appeals in the case of *James C. White, Jr., etc., and State Department of Revenue* v. *Reynolds Metals Company, et al.*, the cause is hereby set for oral argument before this Court at 1:30 p.m. on Monday, December 11, 1989.

Any party wishing to submit briefs in addition to those heretofore filed in the Court of Civil Appeals may do so by filing them with the Clerk of this Court by 4:00 p.m., December 8, 1989.

For the purpose of oral argument, the appellants in the Court of Civil Appeals will be considered to be petitioners, and the appellees in that court will be considered to be respondents. Each side is allowed 30 minutes for argument.

Hornsby, C.J., and Maddox, Jones, Almon, Shores, Adams, Houston, Staagall, and Kennedy, JJ., concur.

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

December 5, 1989

ORDER

The Court having been requested by the Governor to give an advisory opinion on the constitutionality of pending HB 16, pertaining to the imposition of a franchise tax on foreign and domestic corporations, and

The Court being aware of the decision of the Court of Civil Appeals, rendered on November 28, 1989, in the case of *James C. White, Jr., etc., and State Department of Revenue* v. *Reynolds Metals Company, et al.*, in which said Court held § 40-14-41, Alabama Code 1975, unconstitutional, and

The Court desiring to properly address the issue of the constitutionality of present and proposed legislation relating to the imposition of a franchise tax on foreign and domestic corporations,

Now, pursuant to § 6.02(b), Amendment 328, of the Constitution of Alabama of 1901, and § 12-2-7, Alabama Code 1975, the writ of certiorari is hereby issued to the Court of Civil Appeals and the provisions of Rule 39, Alabama Rules of Appellate Procedure, are hereby suspended for the purposes of this case.

Accordingly, the Clerk of the Court of Civil Appeals is directed to forward the record and briefs in case No. Civ. 7246-X, *James C. White, Jr., etc., and State Department of Revenue* v. *Reynolds Metals Company, et al.*, to the Clerk of this Court.

Hornsby, C.J., and Maddox, Jones, Almon, Shores, Adams, Houston, Staagall, and Kennedy, JJ., concur.

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1989-90

Civ. 7246-X

James C. White, Jr., etc., and
State Department of Revenue

v.

Reynolds Metals Company, et al.

Appeals from Montgomery Circuit Court

INGRAM, Presiding Judge

These cases concern the constitutionality of Alabama's franchise tax on foreign corporations pursuant to § 40-14-41, Ala. Code 1975. On July 7, 1989, the trial court found that Ala. Code 1975, § 40-14-41, was unconstitutional because it impermissibly discriminates against foreign corporations in violation of the equal protection clause, U.S. Const. amend. XIV, § 1. On August 14, 1989, the trial court ordered that its decision be applied prospectively and denied the taxpayers' requests for refunds. All parties have appealed.

Facts

Reynolds Metals Company, GMAC Leasing Corporation, General Motors Acceptance Corporation, and General Motors Corporation (taxpayers) are foreign corporations qualified to do business in Alabama and were subject to the levy and payment of Alabama franchise taxes pursuant to Ala. Code 1975, § 40-14-41. However, the taxpayers initiated proceedings in the Circuit Court of Montgomery County seeking to invalidate the Alabama franchise tax on foreign corporations on grounds that it impermissibly discriminates against them in violation of the equal protection clause (U.S. Const. amend. XIV, § 1) and unduly burdens interstate commerce in violation of the commerce clause (U.S. Const. art. I, § 8, cl. 3). The

taxpayers' cases were consolidated and submitted to the trial court on cross-motions for summary judgment.

On the issue of the constitutionality of the franchise tax, the trial court entered a detailed and comprehensive order. That order, in part, is as follows:

> "The Court finds that § 40-14-41 facially discriminates against foreign corporations in favor of domestic corporations and likewise is discriminatory in its application. The statistics and figures quoted in the taxpayers' briefs, as supported by the discovery documents, clearly show a gross disparity of franchise taxes paid by a foreign corporation when compared to domestic corporations. In 1982 and 1983, Alabama collected almost $94,000,000 in franchise tax from approximately 29,000 foreign corporations; however, Alabama collected less than $10,000,000.00 in franchise tax from the 82,000 domestic corporations filing franchise tax returns for 1982 and 1983. The Court has considered the other facts and figures set out in the taxpayers' briefs, finds them supported by the evidence, and adopts them as a basis for its holding in this case. Significantly, the Department of Revenue (Department) has failed to advance any legitimate state purpose for this discrimination. Therefore, the Court is compelled to find that § 40-14-41 discriminates against foreign corporations qualified to do business in Alabama and is unconstitutional."

The trial court pretermitted any discussion of the taxpayers' argument concerning the commerce clause. Also, the trial court reserved any ruling on the appropriate remedy available to the taxpayers until after a hearing was held.

On July 31, 1989, briefs were submitted and arguments were heard on the appropriate remedy and final judgment. Again, the trial court issued a detailed and comprehensive order. The trial court held that whether refunds should be granted is governed by the application of the criteria announced in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). The trial court then concluded that, based on *Chevron*, its holding should be applied prospectively and denied the taxpayers' requests for refunds.

In the main, there are two questions presented to this court by way of appeal and cross-appeal: Whether the franchise tax (§ 40-14-41) is unconstitutional, and if so, what is the appropriate remedy? We will address each issue separately.

I.

First we will discuss whether the franchise tax on foreign corporations (§ 40-14-41) is unconstitutional in that it violates the equal protection clause of the United States Constitution.

The equal protection clause of the United States Constitution requires that a discriminatory tax be rationally related to a legitimate state purpose. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, 451 U.S. 648 (1981). Unless there is such a legitimate state purpose, the State does not have the authority to impose more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations. *Western*, *supra*. The equal protection clause forbids a state to discriminate in favor of its own residents solely by burdening residents of other states. *Metropolitan*, *supra*. As set out by the United States Supreme Court,

> "[t]he validity of the view that a state may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence is confirmed by a long line of this court's cases so holding [cites omitted]."

Metropolitan, *supra*, at 878. Furthermore, "promotion of domestic business within a state, by discriminating against foreign corporations . . . is not a legitimate state purpose." *Metropolitan*, *supra*, at 880.

Here, the record is clear that the amount of franchise taxes paid by foreign corporations is enormously disproportionate to that paid by the domestic corporations. As set out in the trial court's order above, Alabama collected almost $94,000,000 in franchise taxes from approximately 29,000 foreign corporations in 1982 and 1983; however, Alabama collected less than

$10,000,000 in franchise taxes from 82,000 domestic corporations for the same period. Based on the statistics before it, the trial court found, and we agree, that § 40-14-41 clearly discriminates against foreign corporations in favor of domestic corporations. Therefore, the question becomes whether the discriminatory franchise tax is rationally related to a legitimate state purpose.

The trial court found that there was no legitimate state purpose for imposing more onerous taxes on foreign corporations than on domestic corporations. After a review of the record, as well as the briefs before us, we agree.

From a review of the record before us, we find that the taxpayers sought to discover a purpose for the discrimination against them. During discovery, the Department of Revenue (department) was given several opportunities to account for the discrimination. However, the department failed to do so. In fact, the department was specifically requested in an interrogatory to state in detail each and every legitimate state purpose that the State of Alabama was advancing or exercising by distinguishing in the franchise tax scheme. The department's only response was that it relied on the franchise tax law as written. Similarly, the commissioner of revenue and the chief of the franchise tax division were both given opportunities to explain the purpose of the franchise tax system; however, neither of them could offer a reason for the discrimination.

On appeal, the department did advance a reason for the discrimination. It contended that the discrimination against foreign corporations rationally relates to the purpose of offsetting possible *difficulties of enforcing* the franchise tax against foreign corporations. In other words, the State contends that the relationship between the differing tax burdens could be a result of enforcement problems.

We do not find such argument to be persuasive. In fact, the chief of the franchise tax division testified in the trial court that

foreign corporations were easier to regulate and the remedy against them easier and less costly to enforce.

We also point out that the franchise tax, as originally enacted, was never intended to discriminate against foreign corporations. In fact, it was determined that the *sole purpose* for different methods of computing the franchise tax was to ensure that there was *no* discrimination between foreign and domestic corporations. *Louisville & N. R. Co.* v. *State*, 201 Ala. 317, 78 So. 93 (1918). The State intended for its policy toward "domestic and foreign corporations [to be as] uniform as far as possible." *State* v. *Southern Natural Gas Corp.*, 233 Ala. 81, 88, 170 So. 178, 183 (1936); *aff'd*, 301 U.S. 148 (1937).

We have little difficulty in finding that the franchise tax against foreign corporations is clearly a discriminatory tax with no legitimate state purpose. The State has advanced none, nor can we conceive of any legitimate state purpose which would be served by applying the grossly disproportionate tax. Therefore, we affirm the trial court's partial summary judgment order of July 7, 1989, which declared § 40-14-41, Ala. Code 1975, unconstitutional.

II.

We have concluded above that Alabama's franchise tax is indeed unconstitutional and affirm the trial court's July 7, 1989, order. Now, we turn our attention to the appropriate remedy. The trial court concluded that its decision should have prospective relief only, and the taxpayers have appealed.

The first point of inquiry is whether Alabama's statute or case law mandates refunds of the taxes paid prior to the judicial determination that § 40-14-41 is unconstitutional (July 7, 1989). In order to make such a determination, we must decide whether to apply the trial court's order prospectively or retroactively. If we apply the order retroactively, then, theoretically, the taxes collected from the foreign corporations prior to July 7 would have been collected in violation of the

constitution. In that instance, it would appear that the state refund statute would require refunds. See Ala. Code 1975, § 40-1-34. However, if we determine that the trial court's order should be applied prospectively only, then, for purposes of the refund statute, it is as if the taxes paid prior to July 7 were, in fact, constitutionally collected and the foreign corporations would not be entitled to a refund. We also note that we have a third option available. This court could apply the trial court's order "quasi prospectively." Quasi prospectively, like prospectively, protects reliance on prior rules or decisions. However, unlike prospective application, if we determine that quasi prospective application is appropriate, it would afford refund relief to the instant parties in this case.

Therefore, we must now address the question of whether to apply the trial court's July 7, 1989, order prospectively (or quasi prospectively) or retroactively.

At the outset, we would note that the determination of retroactive or prospective application of a decision overruling a former decision is a matter of judicial discretion which must be exercised on a case-by-case basis. *Ex parte State*, 487 So. 2d 898 (Ala. 1986). In deciding whether to give retroactive application to a holding which declares an act unconstitutional, this court must consider matters of public policy. *Land* v. *Bowyer*, 437 So. 2d 524 (Ala. 1983). Clearly, these questions are very difficult and "*it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.*" (Emphasis added.) 437 So. 2d at 526-27 (quoting *Stallworth* v. *Hicks*, 434 So. 2d 229, 230 (Ala. 1983)). Furthermore, as stated in *Ex parte State*, *supra*, at 903 (quoting *Cooper* v. *Hawkins*, 234 Ala. 636, 638, 176 So. 329, 331 (1937)), "where parties have acted upon the law as clearly declared by judicial decisions, they will be protected, although such decisions are thereafter overruled."

We are further guided by *Chevron*, *supra*, where the United States Supreme Court set forth three criteria for determining whether to apply a decision prospectively:

(1) The decision must establish a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

(2) Whether retroactivity will advance or retard the operation of the equal protection clause;

(3) Whether retroactive application would impose inequitable results.

(1) Applying the first prong of the *Chevron* test, we find that this decision does establish a "new rule." The foreign franchise tax structure has been in effect in Alabama since 1907. In 1916, the United States Supreme Court upheld Alabama's franchise tax law as constitutional in the face of an equal protection challenge. *Kansas City, Memphis, & Birmingham Railroad Co.* v. *Stiles*, 242 U.S. 111 (1916). Then, just two years later, the Alabama Supreme Court upheld the constitutionality of the franchise law. *Louisville, supra.* Finally, in 1937, the franchise tax scheme was again upheld against an equal protection challenge in *Southern Natural Gas Corp.* v. *Alabama*, 301 U.S. 148 (1937). However, after the *Southern Natural Gas* decision, Alabama's franchise tax structure has not been challenged until now. Therefore, it appears to this court that, during the time the taxes at issue here were collected, the State had no reason to believe that the franchise taxes were unconstitutional. As concerns any argument that the State possessed specific information that showed the gross disparity in tax collections as early as 1984, we find that, in this instance, (1) it is the courts which are the proper bodies to determine the construction and interpretation of statutes and to declare the law, and (2) a statute is presumed valid until it is attacked. *See Casmus* v. *Lee*, 236 Ala. 396, 183 So. 185 (1938); *see National Can Corp.* v. *State Dept. of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286 (1988). Thus, it appears that the first prong of the *Chevron* test favors prospective application of the rule.

(2) The second prong of the *Chevron* test has no application here. We have upheld the trial court's determination that the statute is unconstitutional. The court has relieved the tax-

payers of the burden, and the legislature will be forced to formulate a franchise tax law which complies with the equal protection clause.

(3) Now we look to the third prong of the *Chevron* test, which involves balancing the equities. If this decision is applied retroactively, Alabama faces possible liability for over $200,000,000 in refunds for taxes it collected in good faith under a presumptively valid statute. Alabama would have to refund large sums of money it has already spent. Prospective application would avoid imposing a severe financial burden on the State and its citizens. In such situations, courts of other jurisdictions have frequently denied retroactive application, even though the ruling allows an unconstitutional statute to remain in effect for a limited period of time. *See American Trucking Association* v. *Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988) (out-of-state truckers were not entitled to refund of taxes found violative of the commerce clause); *National Distributing Co.* v. *Office of the Comptroller*, 523 So. 2d 156 (Fla. 1988) (prospective ruling appropriate where equities weighed against refund of taxes paid under alcoholic beverage statute); *James B. Beam Distilling Co.* v. *State*, 255 Ga. 522, 382 S.E.2d 95 (Ga. 1989); *Metropolitan Life Ins. Co.* v. *Commissioner of Dept. of Insurance*, 373 N.W.2d 399 (N.D. 1985) (no refund of taxes paid under statute giving unconstitutional preference to domestic insurance companies).

We specifically note a recent Georgia Supreme Court case which addressed retroactive application versus prospective application. *James B. Beam Distilling Co.* v. *State*, *supra*. There, a distilling company brought an action to recover a $2.4 million refund in excise taxes that were paid pursuant to a state statute. The court found that the statute was unconstitutional, but applied its decision prospectively only and denied the taxpayer any refunds. The Georgia court did note that there are a number of cases strongly supporting the argument that, because the statute was unconstitutional, it was void ab initio. Nevertheless, the Georgia court held that the void ab initio rule is not an absolute rule and that it has certain exceptions.

The court went on to find that, in balancing the equities of the case, it would be unjust to declare the statute void ab initio, and the court thereby concluded that prospective application of the decision was appropriate.

Therefore, in fairness to all who have justifiably relied upon the constitutionality of § 40-14-41 (*Kansas City, supra; Louisville, supra; Southern Natural Gas, supra)* and in view of *Chevron*, as well as the equities of this case, we affirm the trial court's decision to apply its decision prospectively only.

We are aware of our authority to apply the trial court's decision quasi prospectively, as the taxpayers request. We are also aware that a quasi prospective remedy would afford relief only to the litigants immediately before the court. The justification for such a remedy would be to reward successful litigants and thereby provide an incentive to challenge existing laws in need of reform. See Comment, *Prospective Application of Judicial Decisions*, 33 Ala. L. Rev. 463 1982. However, quasi prospective relief has been criticized by several commentators in that there is the potential for arbitrariness in a court's decision to apply a new rule to the instant parties and to no one else. A decision to reward a few litigants and deny recovery to other similarly situated litigants may itself raise questions of equal protection. Comment, *supra*.

In view of the above, it is the opinion of this court that justice is better served in this instance in applying a solely prospective remedy. We find that the equities here clearly favor such a result.

Therefore, we find that Alabama's refund statute does not require any refunds in taxes that became due prior to July 7, 1989. Consequently, all taxes that became due prior to July 7, 1989, and that have not been paid, or that have been paid under protest, are due and payable.

We discern a lack of consistency between the July 7, 1989, and the August 4, 1989, orders of the trial court concerning the tax assessments against the taxpayer, GMAC Leasing Corpo-

ration. We are satisfied, however, that the August 14, 1989, final order on this aspect clarifies the trial court's decision to apply its decision here prospectively and not otherwise. We determine the significance of this to be that all taxes which were delinquent prior to July 7, 1989, are due and payable by the taxpayer, GMAC Leasing Corporation.

The scholarly briefs and oral arguments of counsel, as well as the learned trial judge's detailed judgment order, aided this court in developing its opinion.

This case is due to be affirmed.

AFFIRMED.

Robertson and Russell, JJ., concur.

OFFICE OF
CLERK OF THE COURT OF CIVIL APPEALS
STATE OF ALABAMA
MONTGOMERY

Re: CIV. 7246 September 27, 1989

James C. White, Jr., etc., Appellant

v.

Reynolds Metals Company, et al., Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

____ Court Reporter granted additional time to file reporter's transcript to and including

____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

____ Appell______ granted 7 additional days to file brief(s) to and including

____ Appellant(s) granted 7 additional days to file reply brief(s) to and including

____ Record on Appeal filed on this date.

____ Appendix Filed on this date.

____ Submitted on Briefs

____ Application for rehearing overruled. No opinion written on rehearing.

____ Permission to file amicus curiae briefs granted

____ Rules suspended

____ Transferred to the Supreme Court for lack of jurisdiction. A/N

XX Motion to stay the judgment pending appeal is hereby denied in each and every aspect.

MAILING ADDRESS:
2600 East South Boulevard, Room 250
Montgomery Alabama 36116

/s/John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NOS. CV-86-1093 AND 87-1837, 88-411, 88-424-426-G

REYNOLDS METALS COMPANY,
Plaintiff,
v.
JAMES C. WHITE, JR., et cetera,
Defendant.

GMAC LEASING CORPORATION, GENERAL MOTORS ACCEPTANCE CORPORATION AND GENERAL MOTORS CORPORATION,
Plaintiffs,
v.
DEPARTMENT OF REVENUE, STATE OF ALABAMA,
Defendant.

FINAL JUDGMENT

On July 7, 1989, this Court entered its memorandum opinion holding that Ala. Code § 40-14-41 was unconstitutional because it impermissibly discriminates against foreign corporations in violation of the Equal Protection Clause (U.S. Const. Amend. 14, § 1). On July 31, 1981, briefs were submitted and arguments were heard on the appropriate remedy and final judgment to enter in these consolidated cases. After the Court's memorandum opinion was filed but prior to argument on the remedy, Reynolds Metals Company filed a motion for the Court to set aside preliminary assessments of foreign corporation franchise taxes for calendar years 1984 and 1985 entered against it by the Alabama Department of Revenue (Department). These assessments are not final; therefore, Reynolds lacks standing to pursue its remedies before this Court.

The Department concedes that if the taxpayers paid the taxes under mistake of law they have complied with the provisions of § 40-1-11 and § 40-1-34 to claim refunds;[1] however, the

---

[1] Section 40-1-34 requires that a taxpayer satisfy two requirements

Department contends that (1) the Court should grant only prospective relief under the Sunburst Doctrine (*Great Northern Railway Company* v. *Sunburst Oil and Refining Company*, 287 U.S. 358 (1932)), and *Chevron Oil Company* v. *Huson*, 404 U.S. 97 (1971); and (2) if the Court orders refunds its order should be stayed until the 1990 legislature has the opportunity to enact a franchise tax law.

In 1981 the United States Supreme Court held that the states may not, consistent with the Due Process Clause, supra, impose more onerous taxes or other burdens on foreign corporations that those imposed on domestic corporations unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose. *Western & Southern Life Insurance Company* v. *State Board of Equalization of California*, 451 U.S. 648, 101 S. Ct. 2070, 2083 (1981) (holding that California's retaliatory tax on foreign insurers doing business in the state did not violate the Commerce Clause).

In 1983 or 1984 the Department, at the request of the Legislature, made a study of franchise taxes paid by foreign and domestic corporations. The purpose of the study was to attempt to determine what would happen if domestic corporations were taxed at the same rate and on the same tax base as foreign corporations. In 1984 the Department assisted in drafting legislation which would result in foreign and domestic corporations being taxed on the capital-employed basis. An equalization of the tax base would decrease the disparity between amount of the franchise taxes paid by foreign and domestic corporations.

Mr. Earnest Broadhead, Chief of the Franchise Tax Division, drafted legislation which would have equalized the tax

---

to obtain a refund: the taxpayer must file a petition for refund within 3 years of paying the tax and the taxpayer must prove his entitlement to a refund by satisfying the Revenue Commissioner that the tax was paid under a mistake of fact or law.

base but the legislation was never introduced in the Legislature. Other legislation was introduced and passed which raised the minimum tax on domestic corporations from $25.00 to $50.00 and increased the tax rates paid by them; however, no attempt has been made to equalize the tax base. See the deposition of Earnest Broadhead taken on August 21, 1988, pp. 8-31.

Before addressing the issue of an appropriate remedy, the Court must address another defense which was belatedly raised by the Department. The Department argues that the taxpayers did not pay the franchise taxes under a mistake of law or fact because the taxpayers paid the franchise tax voluntarily and with full knowledge of the State's franchise tax laws. However, the Department did not develop this argument in oral argument before the Court or in its brief on the remedy.[2] The taxpayers contend that payment of taxes under an unconstitutional statute is a payment under a mistake of law. *Rice* v. *Tuscaloosa County*, 242 Ala. 67, 4 So.2d 497 (Ala. 1941); *Montgomery County* v. *City of Montgomery*, 195 Ala. 197, 70 So. 642 (Ala. 1916). These cases do not support this proposition.

As a general proposition, a taxpayer who voluntarily pays a tax imposed by an unconstitutional law, and does not know that the law is unconstitutional, may not subsequently recover the tax paid. *Coca-Cola Company* v. *Coble*, 33 N.C. App. 124, 234 S.E.2d 477 (N.C. Ct. App. 1977) (citing 84 C.J.S. Taxation § 637 [cited in *Rice*, supra] and 72 Am. Jur. 2d State and Local Taxation § 1087). The North Carolina Supreme Court granted certiorari and affirmed but held that this proposition only remains true in the absence of express statutory authority; and

---

[2] The Department's argument is contrary to the position it took in *Casmus* v. *Lee*, 236 Ala. 396, 183 So. 185 (Ala. 1938), where the taxpayer requested a refund before the Commissioner because a tax was paid by mistake under an unconstitutional statute and the Commission certified to the comptroller the taxpayers entitlement to a refund.

the Court pointed out that North Carolina statutes (G.S. 105-267) would have provided the remedy sought by the taxpayer. *Coca-Cola Company* v. *Coble*, 238 N.E.2d 780 (N.C. 1977). At this point, the Court notes that § 40-1-34 does not condition the right to a refund on the tax being paid involuntarily or under duress, and for the Court to read this condition into the statute would impose a condition not intended by the Legislature.

A more recent decision holds that taxes voluntarily paid under a tax statute which is subsequently declared unconstitutional are taxes paid under mistake of law. *Sun Oil Company* v. *Oklahoma Tax Commission*, 620 P.2d 896 (Okla. 1980). The Court held that the Oklahoma refund statute provided an administrative remedy to recover taxes erroneously paid and there was no requirement that taxes be paid under protest. The Court further notes that the Alabama refund statute and the Oklahoma refund statute are substantially similar. In view of the foregoing, the Court holds that the franchise taxes paid pursuant to § 40-14-41, which this Court has held unconstitutional, were paid under mistake of law.

The Department further argues that the relief ordered by this Court should be prospective only, and in support of its argument relies on *Chevron Oil*, supra, and *Sunburst Oil & Refining Company*, supra. The taxpayers argue that the remedy is mandated by Alabama's refund statute (§ 41-1-34), and because the Department has conceded that the taxpayers have met the two requirements of the statute the Court must order refunds.

This Court has found three Alabama cases which considered *Chevron Oil and Sunburst Oil & Refining; Jackson* v. *City of Florence*, 294 Ala. 592, 600, 320 So.2d 68 (Ala. 1975); *Wilger* v. *Department of Pensions and Security*, 343 So.2d 529, 533 (Ala. Civ. App. 1977); and *Bliley* v. *State*, 42 Ala. App. 261, 263, 160 So.2d 507 (Ala. Ct. App. 1964).

The Court in *Jackson* abolished the rule of municipal immunity from tort by holding that it was a judicially created rule

and not the work of the Legislature; therefore, the Court was not required to invalidate any statute. The Court then opted to apply its new holding quasi-prospectively, i.e., it allowed the plaintiff to proceed with his case against the City of Florence but applied the new rule of law prospectively to all other injured parties. This quasi-prospective application of the rule was bottomed on *Sunburst Oil & Refining Company.* In *Wilger,* the Court of Civil Appeals gave prospective application only to a decision by a three judge federal court which held pertinent provisions of Title 13 §§ 350 & 352 (Code of Ala. 1940) unconstitutional. *Chevron Oil* was one of the cases cited in support of prospective application. Judge Cates in *Bliley* merely referred to *Sunburst Oil & Refining Company* as announcing an unorthodox doctrine, apparently in the context of quasi-prospective application of a new rule of law, when he wrote that a decision of the Alabama Supreme Court announced between the time of trial and consideration of the appeal before him applied prospectively only and did not govern the evidentiary issue confronting the Court of Appeals.

However, in *Ex parte State*, 487 So.2d 898, 903 (1986), the Court held that Morrison's withdrawal of food from its inventory to feed its employers was subject to sales tax. In reaching its decision the Court overruled *Hamm* v. *Windham*, 254 Ala. 356, 48 So.2d 310 (Ala. 1950) but further held that its decision should apply prospectively to protect taxpayers who justifiably relied on *Hamm* which held that the withdrawal was not subject to sales tax. Neither *Sunburst Oil & Refining Company* nor *Chevron Oil Company* were cited by the court. Both *Ex parte State and Jackson* are bottomed on the same premise: the protection of those who justifiably rely on prior precedent.

Before the Court addresses in more detail the State's arguments for prospective relief, it is appropriate to address the taxpayers arguments that the Alabama refund statute mandates a refund of taxes. The Court has been cited to no Alabama case directly on point. Recently, the Courts of other jurisdictions have adopted the argument proffered by the taxpayer. *Hackman* v. *Director of Revenue*, [Ms. No. 71628 May 25, 1989]

(Mo. 1989) (in banc); *First National Bank of Fredericksburg* v. *Commonwealth*, 553 A.2d 937 (Pa. 1989).

The Court in *Hackman* relied on the decision by the United States Supreme Court in *Davis* v. *Michigan Department of Treasury*, ___ U.S. ___, 109 S. Ct. 1500 (1989) and held that Missouri's taxation scheme which exempted certain retirement benefits paid public employees but failed to exempt pensions of federal retirees violated principles of intergovernmental tax immunity by favoring retired state and local governmental employees over retired federal employees. The Court then held that the Missouri refund statutes (§ 136.035.1, RSMo. 1986 and § 143.801.1, RSMo. 1986) provided the remedy. In so holding the Missouri Court apparently relied, to some extent, on *National Can Corp.* v. *Department of Revenue*, 109 Wash.2d 878, 749 Pa.2d 1286, 1287 (Wash. 1988) (in banc). However, as the dissent in *Hackman* points out, the Washington Supreme Court in *National Can* did not hold that its refund statute required refunds; rather, the Washington Court held that neither the Washington refund statutes (RCW82.04.4286 & RCW82.32.060) nor Washington case law mandated that refunds were the proper remedy. The Court in *National Can* applied the *Chevron Oil* test and held that the United States Supreme Court's decision holding Washington's business and occupational tax unconstitutional applied prospectively. The Court said, "The statutory argument ignores the very meaning of prospective application. Washington case law does not support the proposition that tax refunds are always mandated when a statutory scheme is found to be unconstitutional." Id. at 1287.

In *Allis-Chalmers* v. *City of North Bonneville*, [Ms. No. 55810-B July 13, 1989] (Wash. 1998) (in banc), the Court affirmed a lower court decision which found the city business and occupational tax unconstitutional. In affirming the lower court decision which required a refund, the Court again applied the factors set forth in *Chevron Oil*.

The Pennsylvania Supreme Court in *First National Bank of Fredericksburg* held that the Pennsylvania refund statute (P.S.

§ 503 (a)(4) (repealed)) provided a legal right to a refund of back share tax which had previously been held to be computed in violation of federal law. The Court said, "Where a litigant's right to some remedy may be derived from statute, it would be a meaningless exercise for a court to determine whether an identical right is vested in the litigant as a result of prior decisional law." Id. at 941. However, the Pennsylvania refund statute expressly provided that when any tax had been paid under an act which was subsequently held unconstitutional by the final judgment of a court of competent jurisdiction a petition for refund could be filed.

The Supreme Court of Oklahoma again faced the question of whether refunds were required in *First of McAlester Corp.* v. *Oklahoma Tax Commission*, 709 P.2d 1026 (Okla. 1985). Although it had decided *Sun Oil* only four years earlier, the Court applied the *Chevron Oil* analysis and held that its decision holding an Oklahoma bank statute unconstitutional should be applied prospectively from the date of the United States Supreme Court's decision in *Memphis Bank & Trust Company* v. *Garner*, 459 U.S. 392 (1983) which underpinned the decision of the Oklahoma Supreme Court's finding that the state statutes were unconstitutional.

Based on *National Can* and *First of McAlester Corp.*, the Court holds that neither § 40-1-34 nor our case law does not mandates a refund of taxes and that whether refunds should be granted is governed by application of the criteria announced in *Chevron Oil*.

Initially, the Court notes that although *Chevron Oil* was not a tax case it has been applied in the circumstances *sub judice*. *Hackman*, supra (*Williver, J.*, dissenting); *National Can Corp.*, supra; and *First of McAlester Corp.*, supra. Additionally, the Court notes that a new rule of law in a tax case should be applied prospectively where retroactive application would injure those who have justifiably relied on past precedent. *Ex parte State*, supra.

The *Chevron* court set forth three criteria for determining whether to apply a decision prospectively. First, the decision must establish a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, whether retroactivity will further or retard the operation of the Equal Protection Clause. Third, whether retroactive application would impose inequitable results. Id. at 92 S.Ct. 355.

Article XII, § 232 of our 1901 Constitution provides for franchise taxes on foreign corporations. As limited by § 232, the Legislature has provided for levy of franchise taxes against foreign corporations since 1907. *State* v. *Plantation Pipe Line Company*, 265 Ala. 69, 84, 89 So.2d 549 (Ala. 1956).

In 1916 the United States Supreme Court held Alabama's franchise tax law (1911 Ala. Acts 216, § 12) constitutional in the face of an equal protection challenge. The Court held that the tax was imposed equally on all corporations. *Kansas City, Memphis and Birmingham Railroad* v. *Stiles*, 242 U.S. 111 (1916). Two years later the Alabama Supreme Court upheld the Constitutionality of the franchise tax law in question (1915 Ala. Acts 464, § 16) against the taxpayer's challenge that the method prescribed for ascertaining and fixing the amount of the tax operated as an arbitrary discrimination against foreign corporations. *L & N Railroad* v. *State*, 201 Ala. 317, 78 So. 93 (1918). The Court held that under the existing circumstances the act did not arbitrarily discriminate between foreign and domestic corporations; however, the Court forewarned that changed conditions could lead to a different result when it said "as follows:

> Therefore the act in question is in thorough accord with our constitution [Ala. Const. art. XII, §§ 229 & 332], and [the taxpayer] cannot complain of same, unless the method for the assessment of the tax in question, as prescribed by both by §§ 229 and 332 of the Constitution as well as the act *will produce results so wanting in uniformity as to amount to an arbitrary discrimination against [the supplied]*. (emphasis applied).

Louiville & Nashville Railroad Company at 201 Ala. 319. The Court in *Penn Mutual Life Insurance Company* v. *State*, 223 Ala. 332, 135 So. 346 (Ala. 1931) was not called upon to rule on the Constitutionality of the existing corporate franchise tax law (1927 Ala. Acts 163, § 54) but the Court noted that § 232 of our Constitution left to the Legislature the method of fixing or ascertaining the amount of capitol employed in the State so long as the method adopted did not operate as an arbitrary discrimination. Finally, the constitutionality of the Corporate Franchise Tax Act (1927 Ala. Acts 163, § 54) was upheld against, among other things, an equal protection argument in *Southern Natural Gas Corp.* v. *Alabama*, 301 U.S. 148, 81 L. Ed. 970, 876 (1937). The Court has not found any other reported decision in which the constitutionality of the corporate franchise tax law was challenged.

The Court holds that this Court's decision was not *clearly* foreshadowed by prior decisions of any other court. No doubt the State was put on notice by the court's language in *L & N Railroad* that changed circumstances could lead to a judicial finding of impermissible discrimination against foreign corporations. Moreover, it is clear that in 1984 the State possessed specific information which showed the gross disparity in tax collections and that notwithstanding the Department's efforts the State failed to remedy this impermissible discrimination. Finally, although the federal and state organic law remains constant, interpretations of our organic law do not necessarily remain static, they evolve, and one may question whether the State in every instance may *justifiably* rely on every precedent set over 60 years ago. However, the answer to this question is that (1) it is the Court's which are the proper bodies to determine the construction and interpretation of statutes, and to declare the law; and (2) a statute is presumed valid until it is attacked. *Casmus* v. *Lee*, 236 Ala. at 398, *National Can Corp.* 749 P.2d at 1290. Moreover, it cannot be said with certainty that each of the *Chevron Oil* criteria must be met before the Court should decide to apply its decision prospectively. Justice O'Connor's concurring opinion in *Arizona Governing Commit-*

tee v. *Norris*, 463 U.S. 1073, 1109, 103 S. Ct. 3492, 3513 (1983) (O'Connor, J. concurring), suggests otherwise.

The second criterion in *Chevron Oil* requires the Court to determine if the purpose of Equal Protection Clause will be furthered or retarded by retroactive application. See *National Can Company* at 1291 (Court required to make this inquiry with respect to the Commerce Clause).

States have always been allowed to impose taxes and other burdens on foreign corporations for the privilege of doing business within the state's borders; however, the states cannot, consistent with the equal protection clause, impose more erroneous taxes or other burdens on foreign corporations than those imposed on domestic corporations unless the discrimination between them bears a rational relation to a legitimate state purpose. *Wester and Southern Life Insurance Company*, supra.

The Court holds that retroactive application is not necessary to cure the discrimination between foreign and domestic corporations. The Court has relieved the taxpayers of this burden and the Legislature is now forced to formulate a franchise tax law which complies with the Equal Protection Clause. Moreover, applying the decision retroactively would relieve the taxpayers of even their fair share of taxes while they have claimed the same protections and benefits as domestic corporations.[3]

Finally, the Court must consider whether retroactive application would impose inequitable results.

The State has filed affidavits of the Commissioner of Revenue, the State Comptroller and others to show their reliance on the validity of the franchise tax law in levying and collecting franchise taxes, in budgeting the financial resources of the state, and to show the consequences of retroactive application of this Court's decision. Irregardless of the taxpayers' charac-

---

[3] In oral argument, counsel for the taxpayers insisted that they would not be accountable for any tax.

terization of the affidavits they are uncontroverted and the Court concludes that retroactive application would result in an intolerable reduction of necessary and vital state and county services, and would impair the financial and fiscal stability of the state.

The Court therefore concludes that its holding should be applied prospectively. In reaching this conclusion the Court is not unmindful of the taxpayers' argument that the remedy should be applied quasi-prospectively. However, as the taxpayers have accurately pointed out, this Court does not have jurisdiction over taxpayers who may claim refunds but who are not before the Court, and jurisdiction over them is necessary before this Court could apply its decision quasi-prospectively. Although the taxpayers' argument is appealing, this decision is for the appellate courts, if the parties appeal and if this Court's decision is upheld on the merits.

The State has requested that the Court's decision be stayed until the 1990 Legislature can formulate a franchise tax law which complies with the Equal Protection Clause. The affidavit of the Commissioner of Revenue states that substantially all franchise taxes have been collected; therefore, the Court holds that the State will not be irreparably harmed if the Department's request is denied. The Court is confident that the Legislature will promptly address this issue and pass a constitutional franchise tax law.

Based on the foregoing it is ORDERED that this Court's decision is prospective and that the taxpayers' request for refunds are denied. It is further ORDERED that the State's request for a stay of this decision is denied and Reynolds motion is set aside the preliminary assessments is denied.

DONE and ORDERED in chambers this 14th day of August, 1989.

/s/William Gordon
William Gordon
Circuit Judge

cc: Bruce Rawls
Robert W. Bradford, Jr.
Ron Bowden

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NOS. CV-86-1093 AND 87-1837, 88-411, 88-424-426

REYNOLDS METALS COMPANY, a corporation,
Plaintiff,
v.
JAMES C. WHITE, et cetera,
Defendant.

GMAC LEASING CORPORATION, GENERAL MOTORS ACCEPTANCE CORPORATION AND GENERAL MOTORS CORPORATION,
Plaintiffs,
v.
DEPARTMENT OF REVENUE, STATE OF ALABAMA,
Defendant.

PARTIAL JUDGMENT

In accordance with the memorandum opinion entered this date, it is ORDERED and ADJUDGED that Ala. Code § 40-14-41 (1975) impermissibly discriminates in violation of the Due Process Clause (U.S. Const. amend. XIV, § 1) against foreign corporations qualified to do business in Alabama and subject to the levy and payment of Alabama franchise taxes, and § 40-14-41 is declared unconstitutional in violation of the Due Process Clause, supra.

It is further ORDERED that that assessment dated October 21, 1987, entered against GMAC Leasing by the Alabama Department of Revenue is set aside (Case No. CV-87-1837-G).

It is further ORDERED that a hearing is set on July 19, 1989 at 4:00 p.m. to determine an appropriate remedy in those cases not addressed by this partial judgment.

DONE and ORDERED in chambers this 7th day of July, 1989.

/s/ William Gordon
WILLIAM GORDON
CIRCUIT JUDGE

cc: Bruce Rawls
Robert W. Bradford, Jr.
Ron Bowden

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

CASE NOS. CV-86-1093 AND 87-1837, 88-411, 88-424-426-G

REYNOLDS METALS COMPANY, a corporation,
Plaintiff,

v.

JAMES C. WHITE, SR., et cetera,
Defendant.

GMAC LEASING CORPORATION, GENERAL MOTORS ACCEPTANCE CORPORATION AND GENERAL MOTORS CORPORATION,
Plaintiffs,

v.

DEPARTMENT OF REVENUE, STATE OF ALABAMA,
Defendant.

MEMORANDUM OPINION

Reynolds Metals Company, GMAC Leasing Corporation, General Motors Acceptance Corporation and General Motors Corporation (taxpayers) have initiated proceedings in this Court in which they seek to invalidate the Alabama franchise tax on foreign corporations (Ala. Code § 40-14-41 (1975)) on grounds that it impermissibly discriminates against them in violation of the Equal Protection Clause (U.S. Const. amend. XIV, § 1) and unduly burdens interstate commerce in violation of the the Commerce Clause (U.S. Const. art. I, § 8, cl. 3). The case is submitted on cross-motions for summary judgment.

The taxpayers are foreign corporations qualified to do business in Alabama and they are subject to the levy and payment of Alabama franchise taxes pursuant to § 40-14-41. Corporations organized under the laws of Alabama (domestic corporations) are also subject to the levy and payment of franchise taxes; however, the taxes levied against domestic corporations are computed in a manner which results in them paying substantially less franchise taxes than foreign corporations.

Domestic corporations are required to pay $10.00 for each $1,000.00 of capital stock, and the value of the capital stock is derived by determining the aggregate par value of a corporation's issued stock. A foreign corporation's franchise tax is determined by applying the tax rate of $3.00 per $1,000.00 (3%) to the amount of capital employed in the State of Alabama. The amount of capital against which the rate is multiplied is the total of the following items of capital employed in this state: the aggregate par value of its issued stock, surplus and undivided profits, long-term debts, debts to certain related corporations and accelerated depreciation. Section 40-14-41 sets forth the procedures for allocating that portion of a foreign corporation's total capital believed to represent the percentage of capital utilized by the corporation in Alabama. The tax rate is applied to the amount derived by the described procedure.

The taxpayers contend that § 40-14-41 is unconstitutional because (1) it is facially discriminatory and discriminatory in its application and therefore violates the Equal Protection Clause, supra; and (2) unduly burdens interstate commerce and therefore violates the Commerce Clause, supra. Because the Court agrees that the franchise tax against foreign corporations violates the Equal Protection Clause, it pretermits any discussion of the Commerce Clause arguments.

The Court finds that § 40-14-41 facially discriminates against foreign corporations in favor of domestic corporations and likewise is discriminatory in its application. The statistics and figures quoted in the taxpayers briefs, as supported by the discovery documents, clearly show a gross disparity of franchise taxes paid by a foreign corporation when compared to domestic corporations. In 1982 and 1983, Alabama collected almost $94,000,000 in franchise tax from approximately 29,000 foreign corporations; however, Alabama collected less than $10,000,000.00 in franchise tax from the 82,000 domestic corporations filing franchise tax returns for 1982 and 1983. The Court has considered the other facts and figures set out in the taxpayers' briefs, finds them supported by the evidence, and adopts them as a basis for its holding in this case. Significantly,

the Department of Revenue (Department) has failed to advance any legitimate state purpose for this discrimination. Therefore, the Court is compelled to find that § 40-14-41 discriminates against foreign corporations qualified to do business in Alabama and is unconstitutional.

REMEDY

In determining the appropriate remedy for each taxpayer, it is necessary to consider the manner in which each initiated proceedings in this Court.

In Case Number CV-86-1093, Reynolds Metals Company (Reynolds) filed a petition for writ of mandamus asking the Court to direct the Department to certify Reynolds' entitlement to a refund and to direct the state comptroller to draw his warrant to refund the tax years 1982 ($641,611.00) and 1983 ($560,499.00) franchise taxes payed by Reynolds. Section 40-1-34.

In Case Number CV-87-1837, GMAC Leasing Corp. (Leasing) filed an administrative appeal from the Department's final assessment of franchise taxes dated October 21, 1987, for the tax years 1983, 1984, 1985 and 1986 in the total amount of $18,513.00.

In Case Number CV-88-411-G, GMAC filed a petition for writ of mandamus for refund of franchise taxes for the tax years 1983, 1985 and 1986 in the total amount of $3,006,498.00, and it filed an amended petition for refund of 1987 tax year franchise taxes in the amount of $1,874,000.00. In Case Number CV-88-425 GMAC filed a declaratory judgment seeking a refund of 1988 tax year franchise taxes paid under protest in the amount of $1,280,000.00.

In Case Number CV-88-424, General Motors Corp. filed a complaint for declaratory judgment for a refund of tax year 1988 franchise taxes paid under protest in the amount of $206,093.00.

It appears to the Court from the face of the pleadings, with attachments, that in those cases in which the taxpayers have

sought a refund the requirements of § 40-1-34 have been met; nevertheless, a hearing will be held on July 19, 1989 at 4:00 p.m. to consider whether the taxpayers have complied with § 40-1-34 in seeking refunds, and for the Court to hear any arguments counsel may wish to present on the appropriate remedy.[1]

In Case Number CV-87-1837 the final assessment shall be set aside.

A partial judgment will enter.

DONE and ORDERED in chambers this 7th day of July, 1989.

/s/ William Gordon
WILLIAM GORDON
CIRCUIT JUDGE

cc: Bruce Rawls
Robert W. Bradford, Jr.
Ron Bowden

---

[1] On July 3, 1989, the United States Supreme Court ordered reargument in the cases of *Division of Alcoholic Beverages and Tobacco* v. *McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), cert. granted, 109 S.Ct. 389 (1988) and *American Trucking Assoc.* v. *Gray,* 746 S.W.2d 377 (1988), cert. granted, 109 S.Ct. 389 (1988), and requested the parties to brief and argue the following questions: "When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief; and "May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Clause by retreoactively raising the taxes of those who benefited from the discrimination?"

MAILING ADDRESS: TELEPHONE: 261-4609
PO Box 157
Montgomery, Alabama 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 89-386

In Re: James C. White, Jr., etc., and
State Department of Revenue, Appellant
v.
Reynolds Metals Company, et al., Appellee

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXX Application for rehearing overruled. No opinion written on rehearing. Per Curiam—Hornsby, CJ., Maddox,

Jones, Almon, Shores, Adams, Houston, Steagall and Kennedy, J.J., concur.

_____ Permission to file amicus curiae briefs granted.

/s/ Robert G. Esdale
Robert G. Esdale, Clerk
Supreme Court of Alabama

THE STATE OF ALABAMA JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

December 21, 1989

CV-86-1093

Re: 89-386

James C. White, Jr., etc., and
State Department of Revenue

v.

Reynolds Metals Company, et al.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(CIV 7246-X (Montgomery CV-86-1093, 87-1837, 88-411, 88-424, 88-425 and 88-426-G)

CERTIFICATE OF JUDGMENT

WHEREAS, on December 5, 1989, a Writ of Certiorari to the Court of Civil Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure,

IT IS CONSIDERED AND ORDERED that the judgment of the Court of Civil Appeals be reversed and rendered in accordance with the opinion this day issued in this cause. NO COSTS TAXED.

OPINION BY ALMON, J.

Hornsby, C.J., and Maddox, Jones, Shores, Adams, Houston, Steagall, and Kennedy, JJ., concur.

INFORMATION REQUIRED BY RULE 29.1

Reynolds Metals Company, the Petitioner herein, is publicly traded on the New York Stock Exchange. The only corporation owning 5% or more of Appellant is Templeton, Galbraith & Hausberger, Ltd.

SUBSIDIARIES:
- Eskimo Pie Corporation
- Halco (Mining), Inc.
- Volta Aluminium Company Limited
- Albev Trading, Inc.
- Aluminio Reynolds del Peru Sociedad Anonima
- Aluminium Corporation of the Philippines
- Compagnie des Bauxites de Guinee
- Eskimo Europ, S.a.r.l.
- Industria Navarra del Aluminio, S.A.
- Industrias Lacteas del Yocomia, S.A.
- Manicouagan Power Company
- Mineracao Rio do Norte S.A.
- New Eastwick Corporation
- Phillips-C.B.A. Conductors Limited
- Reynolds Philippine Corporation
- Worsley Alumina Pty., Ltd.
- Bennett Manor Associates
- Burrstone Associates
- Cathedral Square Associates
- Curtis Apartments Associates
- Cypress Courts Associates, Ltd.
- Drew Gardens Associates, Ltd.
- Midtown Associates
- Oceanside Estates Associates, Ltd.
- One Empire Plaza Associates
- Rayburn Manor Associates
- Titusville Manor Associates
- Eastwick Joint Venture I
- Eastwick Joint Venture IV
- Mount Gibson Joint Venture
- The Reynolds-Gilbane-Weybosset Joint Venture
- Worsley Joint Venture

1401 17th Street Associates
Crown Oak Associates of Penfield
Kimbrook Manor Associates, Ltd.
Alternative Housing Associates
Bartram Airplex Incorporated
Quadrangle Development
Eastwick Joint Venture V & VII
Aluminerie de Becancour, Inc.
Arteaga, Sociedad Anonima,
"Arteaga, S.A."
Becancour Joint Venture
Boddington Joint Venture
ES/PA, L.P.
Industrias del Lacado,
S.A. (INDULACSA)
Industrias Gomariz, S.A.
Pechiney Reynolds Quebec, Inc.
Ruedas de Aluminio C.A. "RUALCA"

ALABAMA CONSTITUTIONAL PROVISIONS

Sec. 229. Special laws conferring corporate powers prohibited; general law as to grant of amendment of corporate charters; corporation franchise taxes to be paid; exemption of benevolent, educational or religious corporations from franchise taxes.

The legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject nevertheless, to repeal at the will of the legislature; and shall pass general laws under which charters may be altered or amended. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this state, which shall be in proportion to the amount of capital stock; but strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws.

Sec. 232. Foreign corporations doing business in state.

No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the state of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax.

STATUTORY PROVISIONS
CODE OF ALABAMA (1975)

Sec. 40-14-40. Amount of Levy on Domestic Corporations. (in effect in 1982-83)

Every corporation organized under the laws of this state; except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of three dollars ($3.00) on each one thousand dollars ($1,000.00) of its capital stock; provided, however, in no event shall the amount paid by any corporation for annual franchise tax be less than the sum of twenty-five dollars ($25.00).

§ 40-14-40. Amount of levy on domestic corporations. (in effect at present)

Every corporation organized under the laws of this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax based on its capital stock as follows:

For the tax year beginning	Rate on each $1,000.00 of capital stock
January 1, 1984	$10.00
And all tax years thereafter	$10.00

provided, that in no event shall the amount paid by any corporation for annual franchise tax be less than the sum of $50.00.

§ 40-14-41. Levy on foreign corporations.

(a) *Amount of levy.*—Every corporation organized under the laws of any other state, nation or territory and doing business in this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of $3.00 on each $1,000.00 of the actual amount of its capital employed in this state. Corporations which have qualified to do business in this state shall for the purpose of this title prima facie be held to be doing business in Alabama; provided, that in no event shall the amount paid by any corporation for annual franchise tax be less than the sum of $25.00.

(b) *Definition of capital.*—The total capital of such foreign corporation shall be deemed to be an amount equal to the sum of the following:

(1) The outstanding capital stock;

(2) Surplus and undivided profits, which shall include any amounts designated for the payment of dividends until such amounts are definitely and irrevocably placed to the credit of stockholders subject to withdrawal on demand;

(3) The amount of bonds, notes, debentures or other evidences of indebtedness maturing and payable more than one year after the first day of the franchise tax year;

(4) The amount of the bonds, notes, debentures or other evidences of indebtedness maturing and payable at the time to (i) any individual stockholder owning directly or indirectly 10 percent or more of the capital stock of such foreign corporation or (ii) another corporation owning more than 50 percent of the capital stock of such corporation, or (iii) another corporation more than 50 percent of the capital stock of which is owned by such foreign corporation, and which other corporation referred to in (ii) or (iii) is not also required to pay a franchise tax to the state of Alabama;

(5) The amount reasonably required to adjust the depreciable property accounts for any rapid, excessive or unreasonable depreciation charges or amortization, so as to restore the depreciable property accounts, for franchise tax purposes, to original cost less depreciation computed on the basis of the useful life of such property to the corporation.

(c) *Determination of capital employed in state.*—The actual amount of such total capital as herein defined which is employed in this state shall be determined in accordance with generally accepted accounting principles appropriate in the particular case, and such determination shall establish a rebuttable presumption as to the actual amount of capital employed by the corporation in this state; provided, that in the case of organizations whose accounts and records are kept according to rules prescribed by a reg-

ulatory agency or instrumentality of the United States or by the Alabama public service commission, or by a state insurance department, the actual amount of capital employed in this state as so determined shall in no event exceed the value of the sum of its tangible property located in this state and its intangible property employed in the conduct of its business in this state.

(d) *Exclusions and deductions.*

(1) There shall be excluded from the amount of capital as determined in subsection (b) of this section the investment by the taxpayer in the capital of other corporations organized under the laws of Alabama, or under the laws of any other state if such other corporations also pay a franchise tax to the state of Alabama, unless the taxpayer is a dealer in stocks or securities, and

(2) There shall be deducted from the amount of capital employed in this state as determined in accordance with subsections (b) and (c) of this section, the following amounts:

a. The aggregate amount of loans of money made by the taxpayer in this state and which shall be secured by existing mortgage or mortgages to it on real estate in this state and upon which mortgage or mortgages there shall have been paid the recording privilege tax provided by law;

b. The amount invested by the taxpayer in bonds or other securities issued by the state of Alabama, or any county, municipality or other political subdivision of the state of Alabama, or any public corporation organized under the laws of the state of Alabama, unless such corporation is a dealer in securities; and

c. The amount invested by the taxpayer in all devices, facilities or structures, and all identifiable components thereof or materials for use therein, acquired or constructed primarily for the control, reduction or elimination of air or water pollution.

"§ 40-14-70.

"(a) Every share of any domestic corporation except:

"(1) Financial institutions which comply with the provisions of this title as to the excise taxes herein levied on such financial institutions (financial institutions within the meaning of this section and as expressly exempted from the provisions hereof are hereby defined as follows: any corporation or any legal entity whatever doing business in this state as a bank, banking association, trust company, industrial or other loan company, building and loan association and any other corporation or institution employing money capital coming into competition with the business of national banks); and

"(2) Insurance companies which are subject to the provisions of this title as to premium taxes herein levied on such insurance companies and which shall be exempt from the tax assessed hereunder, shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or principal office in the state and shall be assessed at 20 percent of its value to the person in whose name such shares stand on the books of the corporation and not to the corporation.

"(b) In the event the excise tax levied by this title upon such financial institutions be declared unconstitutional, the tender to the department of revenue of such exise tax despite such unconstitutionality shall be a bar to any demand, claim, levy or assessment of any ad valorem tax under this section.

"(c) The president or managing officer of every such corporation shall make out and return under oath to the tax assessor and to the department of revenue a list showing the total number of shares of the capital stock of such corporation and the par value thereof, the full name and residence of each stockholder, as far as known, the actual value thereof, the date of the last sale of shares of stock of such corporation, with the name of the seller and the purchaser and the price paid for same, and the annual dividend declared on the stock of such corporation for the last three years, and the value of the shares as shown by the books of the corporation and by the last report of the officers to the shareholders, and the amount of surplus, and the amount of the undivided profits not included in the surplus and such other information as may be required by the department of revenue.

There shall be attached to the copy of the return made to the department of revenue a true balance sheet as shown by the books, showing the condition of such corporation at the close of its fiscal period next preceding October 1 of the year for which the assessment is to be made. Such corporations shall at the same time make a tax return sworn to by its president or manager to the department of revenue and to the county tax assessor on forms prescribed and furnished by the department of revenue of all taxable property, real and tangible personal, situated in the state and owned by such corporation.

"(d) The department of revenue, after determining the total value of the shares of capital stock, shall deduct from the total value of such shares:

"(1) The book value of real and tangible personal property owned in other states, and the book value of all devices, facilities or structures, and all identifiable components thereof, or materials for use therein, designed or constructed primarily for the control, reduction or elimination of air or water pollution in this state, and used by the domestic corporation primarily for the control, reduction or elimination of air or water pollution where such air or water pollution has been caused by the domestic corporation claiming the deduction.

"(2) The book value of goods, wares and merchandise held for sale.

"(e) The department of revenue, after determining the total value of the shares of stock remaining for assessment, shall take 20 percent thereof, which shall be assessed value of the shares of said corporation.

"(f) After the assessed value of all the shares has been passed on and determined, the department of revenue shall deduct from the assessed value of such shares the assessed value of the taxable real and tangible personal property owned, assessed and on which taxes are to paid by the corporation, as shown by such tax return filed by the corporation in the state of Alabama, or as finally determined; provided, that should the assessed value of the real and tangible personal property as shown by such tax return differ from the assessed value of the real and tangi-

ble personal property as finally determined by the taxing authorities required to assess such property, or in case of appeal, as finally determined by the court of last resort, the same shall not affect the assessed value of all the shares of the corporation as fixed by the department of revenue.

"(g) After deducting the assessed value of the real and tangible personal property located in the state of Alabama, any remainder shall constitute the residue of said shares of stock of said corporation. The residue divided by the whole number of shares will constitute the assessment for each share of stock.

"(h) Whenever the department of revenue shall have passed on the valuation and assessment of the shares of any domestic corporation as herein provided, it shall give notice in writing by certified mail, return receipt demanded, to the president of managing officer or person signing the tax return for the corporation, or if no return has been made, then such notice to be addressed to any officer of the corporation against whose shares the assessment has been made, giving notice of the valuation and assessment, stating that on a day specified, it will determine any complaint against said valuation, which notice must be served at least 10 days before the day specified for a final determination of the assessment. Upon hearing the complaint of protest against any valuation or assessment of the shares of the domestic corporation or if there has been no complaint or objection filed on or before the date specified in the notice for determination of such matter, the department of revenue shall proceed to determine and fix the value of such shares and complete the assessment thereof.

"(i) It is the meaning and intent of this section that the assessed value of all the shares of the corporation be fixed by the department of revenue and that there be deducted therefrom the correct assessed value of the real and tangible personal property of the corporation when the same shall finally be determined; provided, that if any property owned by a corporation which property is subject to taxation in this state is omitted from the tax return filed by said corporation, the same shall be assessed as an escape item or items of taxation in the same manner as escaped prop-

erty of individuals and the value of such omitted property shall not be deducted from the value of the shares of stock of the corporation as assessed for taxation. If the aggregate assessed value of the shares does not exceed the aggregate assessed value of the real and tangible personal property of the corporation, then no tax shall be demanded or collected on the shares."

§ 40-1-34. Refund on overpayment made directly to department of revenue.

Where any taxpayer in the payment of taxes or licenses which are paid directly to the department of revenue, by a mistake of fact or law has paid an amount in excess of the amount due or has made an erroneous payment, the comptroller is authorized to draw his warrant on the treasurer in favor of such taxpayer, and the treasurer is authorized to pay such warrant for the amount of such overpayment or erroneous payment.

Before any refund under this section can be made, the taxpayer, his heirs, successors or assigns shall file in duplicate a petition directed to the department of revenue, setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within three years from the date of such payment.

The department of revenue shall examine said petition and the records of the department of revenue, and if the facts set forth in the petition are such as to entitle the petitioner to the refunding of the money as prayed for and the department of revenue, upon the evidence adduced, is satisfied that the petitioner is entitled to the refund as prayed for, he shall so certify to the comptroller stating the amount to be refunded by the state, the particular fund on which such warrant shall be drawn and forward to the comptroller a copy of the petition with the certificate attached, and if the comptroller shall be satisfied that the petition is in form required by law, he shall draw his warrant on the treasurer as hereinbefore provided for the amount certified to him by the department of revenue. (Acts 1931, No. 432, p. 527; Code 1940, T.

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA
CIVIL ACTION NO. ________

REYNOLDS METALS COMPANY, a corporation,
Plaintiff,

v.

JAMES C. WHITE, SR., as Commissioner of the State of Alabama Department of Revenue,
Defendant.

PETITION FOR WRIT OF MANDAMUS

Comes now Reynolds Metals Company ("Reynolds"), a Delaware corporation, and petitions the Circuit Court of Montgomery County for a writ of mandamus directed to James C. White, Sr., Commissioner of the State of Alabama Department of Revenue ("Department"), ordering Commissioner White to certify to the Comptroller of the State of Alabama refunds of Alabama foreign corporation franchise taxes (levied upon Reynolds under authority of *Code of Alabama* § 40-14-41 (1975)) paid by Reynolds in 1982 and 1983, together with interest thereon and costs as provided by law. As grounds for said petition, Reynolds shows as follows:

1. Reynolds is a corporation organized on or about July 18, 1928, under the laws of the State of Delaware. Reynolds qualified to do business in Alabama on or about October 16, 1940.

2. On or about March 1, 1982, Reynolds filed with the Department a "Foreign Franchise Tax Extension Request, Permit Application, and Annual Report" on the form prescribed by the Department, pursuant to which Reynolds requested an extension of time until September 15, 1982, within which to file its 1982 State of Alabama foreign corporation franchise tax return (Form F T1-1). At the time it requested such extension, Reynolds remitted $100.00 to the Department representing the permit fee levied by *Code of Alabama* § 40-14-21 (1975) with respect to calendar year 1982.

The Department notified Reynolds that its extension request was granted on March 5, 1982.

3. On or about September 14, 1982, Reynolds filed with the Department a "Foreign Corporation Franchise Tax Return, Permit Application, and Annual Report" (Department Form F T1-1) for the purpose of calculating and reporting its 1982 foreign corporation franchise taxes. Simultaneously with the filing of its 1982 foreign corporation franchise tax return, Reynolds remitted to the Department $641,611 representing the foreign corporation franchise taxes levied by *Code of Alabama* § 40-14-41 (1975) with respect to calendar year 1982.

4. On or about March 2, 1983, Reynolds filed with the Department a "Foreign Franchise Tax Extension Request, Permit Application, and Annual Report" on the form prescribed by the Department, pursuant to which Reynolds requested an extension of time until September 15, 1983, within which to file its 1983 State of Alabama foreign corporation franchise tax return (Form F T1-1). At the time it requested such extension, Reynolds remitted $100.00 to the Department representing the permit fee levied by *Code of Alabama* § 40-14-21 (1975) with respect to calendar year 1983. The Department notified Reynolds that its extension request was granted on March 8, 1983.

5. On or about September 14, 1983, Reynolds filed with the Department a "Foreign Corporation Franchise Tax Return, Permit Application, and Annual Report" (Department Form F T1-1) for the purpose of calculating and reporting its 1983 foreign corporation franchise taxes. Simultaneously with the filing of its 1983 foreign corporation franchise tax return, Reynolds remitted to the Department $560,499 representing the foreign corporation franchise taxes levied by *Code of Alabama* § 40-14-41 (1975) with respect to calendar year 1983.

6. Pursuant to *Code of Alabama* § 40-1-34 (1975), on or about May 8, 1985, Reynolds filed with the Department a "Petition for Refund of Taxes," attached hereto as Exhibit "A," in which it requested the Department to refund its entire

remittance of 1982 foreign corporation franchise tax. In its Petition for Refund of Taxes, Reynolds claimed that the Alabama foreign corporation franchise tax unconstitutionally discriminates against foreign corporations.

7. Pursuant to *Code of Alabama* § 40-1-34 (1975), on or about May 8, 1985, Reynolds filed with the Department a "Petition for Refund of Taxes," attached hereto as Exhibit "B," in which it requested the Department to refund its previous remittance of 1983 foreign corporation franchise tax. In its 1983 Petition for Refund of Taxes, Reynolds claimed that Alabama's foreign corporation franchise tax unconstitutionally discriminates against foreign corporations.

8. On or about June 25, 1986, Reynolds received a letter from the Department of Revenue, attached hereto as Exhibit "C," denying the requested refunds for the 1982 and 1983 foreign corporation franchise taxes.

9. The Petitions for Refund of Taxes, filed by Reynolds with respect to its 1982 and 1983 foreign corporation franchise taxes adequately show that Reynolds has overpaid its 1982 and 1983 foreign corporation franchise taxes under a mistake of fact or law as required by *Code of Alabama* § 40-1-34 (1975). The Department has erroneously and illegally refused to certify Reynolds' entitlement to refunds of its 1982 and 1983 foreign corporation franchise tax overpayments, and the Department's refusal is in violation of *Code of Alabama* § 40-1-34 (1975).

10. The foreign corporation franchise tax paid by Reynolds in each of 1982 and 1983 under authority of *Code of Alabama* § 40-14-41 (1975), as amended, was imposed on foreign corporations doing business in the State of Alabama based on the actual amount of capital employed by such foreign corporations in the State of Alabama. During each of the years 1982 and 1983, corporations organized and existing under the laws of the State of Alabama were obligated to pay franchise taxes imposed on such domestic corporations' capital stock.

11. The taxable base and measure of the Alabama franchise tax as levied on foreign and domestic corporations is dissimilar

in theory and results in the taxation of Reynolds, as a foreign corporation, by a different and much more onerous rule than is used in taxing a similarly situated domestic corporation for the same privilege. The distinction in treatment between foreign and domestic corporations is not related in any rational or functional way to the statutory purpose of the foreign corporation franchise tax imposed by the State of Alabama; therefore the statute both on its face and in operation is void and discriminatory and in violation of the Fourteenth Amendment to the Constitution of the United States and constitutes an unreasonable burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

12. The Department has entered preliminary assessments of foreign corporation franchise taxes against Reynolds under authority of *Code of Alabama* § 40-14-41 (1975) for each of calendar years 1984 and 1985. The 1984 and 1985 preliminary tax assessments involve the same issues raised by Reynolds in its Petitions for Refund of Taxes filed with respect to 1982 and 1983, and this Court's action with respect to this petition shall, by agreement among Reynolds and the Department, control the disposition of the 1984 and 1985 preliminary assessments to the extent they involve the issues raised in this petition.

WHEREFORE, Reynolds requests that this Court:

(a) order Commissioner White to answer this Petition;

(b) issue a writ directing Commissioner White to approve and certify Reynolds' Petitions for Refund of Taxes filed with respect to its payments of foreign franchise taxes for the years 1982 and 1983 and ordering Commissioner White to take all other appropriate steps to refund to Reynolds all previous payments of foreign corporation franchise taxes made by Reynolds for such years; and

(c) enter an order providing such further relief, including interest on all amounts refunded to Reynolds as provided by law and the costs of this action, as the Court shall deem necessary and appropriate.

/s/____________________
LOUIS H. ANDERS, JR.

/s/____________________
BRUCE A. RAWLS
Attorneys for Plaintiff

OF COUNSEL:

BURR & FORMAN
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

STATE OF VIRGINIA)

HENRICO COUNTY)

Before me, a Notary Public in and for said County in said State, personally appeared C. Richard Foote, who is known to me and who, being first duly sworn on oath, says:

1. That he is the Manager, State Taxes of Reynolds Metals Company;

2. That he has read the foregoing Petition for Writ of Mandamus, and knows the contents thereof, and that he is informed and believes, and upon such information and belief states, that the facts set forth therein are true and correct;

3. That he is informed and believes, and on the basis thereof states, that the attachments to the foregoing Petition for Writ of Mandamus are complete and accurate.

/s//C. RICHARD FOOTE

Sworn and subscribed to before me this 24th day of July, 1986.

/s/THELMA W. SNEAD
Notary Public
My Commission Expires:
March 17, 1990

PETITION FOR REFUND OF TAXES

STATE DEPARTMENT OF REVENUE

MONTGOMERY, ALABAMA

The undersigned hereby makes application for refund of Six Hundred Forty-One Thousand Six Hundred Eleven and No/100 Dollars. ($641,611.00) Franchise tax paid by said undersigned to the State Department of Revenue on the 15th of September, 1982, which amount was erroneously paid, or paid in excess of the amount due, or was paid through mistake of fact or law.

Said amount of tax was erroneously paid by reason of the following stated facts, viz:

The franchise tax levied against the taxpayer, a foreign corporation, unconstitutionally discriminates against foreign corporations, and the taxpayer should be refunded the entire amount of franchise tax paid by it with respect to 1982.

REYNOLDS METALS COMPANY

/s/By: ____________________

C.R. FOOTE

Its: Manager, State Taxes

6603 Broad Street Road
Richmond, Virginia 23230

Sworn found subscribed before me this 28th day of March, 1985

/s/MARY KAY REDD
Notary Public

Approved ________________
Legal Division

My Commission Expires October 1, 1988

Note: Any receipt, license or other document showing the payment or curorcous payment should be attached to the petition.

Petition must be filed in duplicate

EXHIBIT "A"

PETITION FOR REFUND OF TAXES

STATE DEPARTMENT OF REVENUE

MONTGOMERY, ALABAMA

The undersigned hereby makes application for refund of Five Hundred Sixty Thousand Four Hundred Ninety-Nine and No/100 Dollars. ($560,499.00) Franchise tax paid by said undersigned to the State Department of Revenue on the 15th of September, 1983, which amount was erroneously paid, or paid in excess of the amount due, or was paid through mistake of fact or law.

Said amount of tax was erroneously paid by reason of the following stated facts, viz:

The franchise tax levied against the taxpayer, a foreign corporation, unconstitutionally discriminates against foreign corporations, and the taxpayer should be refunded the entire amount of franchise tax paid by it with respect to 1983.

REYNOLDS METALS COMPANY

/s/By: ____________________

C.R. FOOTE

Its: Manager, State Taxes

6603 Broad Street Road
Richmond, Virginia 23230

Sworn found subscribed before me this 28th day of March, 1985

/s/MARY KAY REDD — Notary Public

Approved ________________ Legal Division

My Commission Expires October 1, 1988

Note: Any receipt, license or other document showing the payment or curorcous payment should be attached to the petition.

Petition must be filed in duplicate

EXHIBIT "B"

STATE OF ALABAMA
DEPARTMENT OF REVENUE
Montgomery, Alabama 36130
June 20, 1986

Reynolds Metals Company — Account #855897
C/O Tax Department
P.O. Box 27003
Richmond, Virginia 23261

Attention: Mr. C. R. Foote,
Manager, State Taxes

Dear Mr. Foote:

We have received your petitions for refund of franchise tax for the years 1982 and 1983. This letter is to advise you that your petitions for refund have been denied.

Yours very truly,

FRANCHISE TAX DIVISION

/s/____________________
Robert A. Holmes
Corporation Tax Specialist
(205) 261-3457

RAH:ja

EXHIBIT "C"

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1989-90

ADVISORY OPINION NO. 330

To the Honorable Guy Hunt
Governor
State of Alabama
Governor's Office
Montgomery, Alabama 36130

Dear Governor Hunt:

We postponed our answer to your request for an advisory opinion pending our decision in *In re James C. White* v. *Reynolds Metals Co.*, [Ms. 89-386, December 21, 1989] ___ So.2d ___ (Ala. 1989). Given the decision of the Court of Civil Appeals in that case, the contents of your proposed tax legislation, and the mandates of § 229 and § 232 of the Alabama Constitution, it was impossible for us to properly respond to your inquiry without first determining whether the franchise tax on foreign corporations was constitutional when measured against the equal protection and commerce clauses of the United States Constitution.

It thus became necessary for this Court to exercise its supervisory powers and issue a writ of certiorari to the Court of Civil Appeals, because we are not at liberty to change the meaning of the Alabama Constitution unless we first determine that the United States Constitution mandates such a change, and because it became clear that none of the parties would invoke an expedited review in time for this Court to make such a determination during the special session of the legislature.

Therefore, in conjunction with our release today of the *White* decision, we hereby answer your request as to the constitutionality of pending bill H.B. 16 under the Alabama Constitution of 1901, Article XII, § 229. That request reads as follows:

"The question is whether the proposed statute violates Section 229. The relevant text of the proposed statute reads as follows:

"(a) Every corporation doing business in this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax at a rate to be established, *based on its actual capital employed in this state;* provided, that in no event shall the amount paid by any corporation for annual franchise tax be less than the sum of $100.00.

"(b) The term 'corporation,' as used in this chapter, shall be construed to include all joint stock companies, and all associations having any of the powers or privileges of corporations not possessed by individuals or corporations.

"(c) A corporation's *actual capital employed in this state shall be the product of the value of its capital stock multiplied by its allocation factor.* The value of a corporation's capital stock shall be deemed to be the sum of the following:

"(1) The issued capital stock, without reduction for the value of shares issued, repurchased and now held as treasury stock;

"(2) Surplus and undivided profits, which shall include any amounts designated for the payment of dividends until such amounts are definitely and irrevocably placed to the credit of stockholders subject to withdrawal on demand;

"(3) The amount of bonds, notes, debentures, or other evidences of indebtedness payable in one year;

"(4) The amount of bonds, notes, debentures, or other evidences of indebtedness maturing and payable at the time to;

"(i) any stockholder owning directly or indirectly 10 percent or more of the capital stock of such corporation; or

"(ii) any corporation, not required to pay a franchise tax to the State of Alabama, owning more than 50

percent of the capital stock of the taxpaying corporation; or

"(iii) any corporation, not required to pay a franchise tax to the State of Alabama, more than 50 percent of the capital stock of which is owned by the taxpaying corporation.

"(5) The amount of all and any other liabilities which are due and payable more than one year after the first day of the tax period.

"(d) *The allocation factor* used in determining a corporation's actual capital employed in this state *shall be established* by regulation promulgated by the commissioner of revenue *to account for a corporation's property situated in this state and its business done and transacted in this state.*

"(e) The following shall be excluded from the value of capital stock of a filing corporation:

"(i) deposit liabilities of financial institutions as defined by state or federal law; and

"(ii) a corporation's investment or other ownership interest in a subsidiary corporation subject to filing under the provisions of this chapter; provided, that the subsidiary corporation includes such investment or other ownership interest in the value of its own capital stock.

"(f) If the commissioner determines that a corporation's return for any tax year does not accurately disclose the actual capital employed in this state by the corporation, the actual capital employed in this state by the corporation for that tax year shall be determined by the commissioner based upon any other information obtained by the commissioner."

(Emphasis added.)

Section 229 of the Alabama Constitution of 1901, as amended by amendment number 27, reads, in pertinent part:

"The legislature shall, by general laws, provide for the payment to the state of Alabama of a franchise tax by

> corporations organized under the laws of this state which shall be *in proportion to the amount of capital stock.*"

(Emphasis added.)

We answer your question in the affirmative. As we stated in detail in *In re White* v. *Reynolds Metals Co., supra,* § 229 makes no provision for apportionment or allocation of the franchise tax on domestic corporations. The constitutional convention explicitly amended the provision applying to foreign corporations, now found at § 232, so as to allow such apportionment. *Id.* The failure to so amend § 229 provides convincing evidence that the framers did not intend to allow such appointment with regard to domestic corporations, and the terms of that section do not allow such apportionment.

The proposed bill would make a domestic corporation's franchise tax proportional, not to its capital stock alone, but to its "actual capital employed in this state," which is a product of its "capital stock," as defined, and an "allocation factor," which takes into account the corporation's property situated in this state and its business transacted in this state. Thus, supposing two domestic corporations with equal "amounts of capital stock" (§ 229), but one with all of its business and property in this state and the other with only 1% of its business and property in this state, the former would pay 100 times more franchise tax. The proposed tax is not in proportion to the amount of capital stock.

In sum, therefore, § 229 provides that a franchise tax on a domestic corporation is to be imposed in proportion to its capital stock, but the proposed tax would decrease according a second proportion, that is, the proportion of the corporation's property situated outside this state and its business transacted outside this state. That second proportion prevents the statute from complying with § 229.

QUESTION ANSWERED.

/s/____________________
SONNY HORNSBY
Chief Justice

/s/____________________
HUGH MADDOX

/s/____________________
RICHARD L. JONES

/s/____________________
RENEAU P. ALMON

/s/____________________
JANIE L. SHORES

/s/____________________
OSCAR W. ADAMS, JR.

/s/____________________
J. GORMAN HOUSTON, JR.

/s/____________________
HENRY B. STEAGALL, II

/s/____________________
MARK KENNEDY
Associate Justices